

United States
Circuit Court of Appeals
For the Ninth Circuit.

MILLIE L. EVANS, now MILLIE L. JONES,
Plaintiff in Error,
vs.
J. B. DANIEL,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

FILED
AUG 21 1922
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MILLIE L. EVANS, now MILLIE L. JONES,
Plaintiff in Error,

VS.

J. B. DANIEL,

Defendant in Error.

Transcript of Record.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

BOOTH B. GOODMAN, Esq., of Lovelock, Nevada,
and ROBERT RICHARDS, Esq., of Carson
City, Nevada,

For Plaintiff and Defendant in Error.

W. M. KEARNEY, Esq., and Messrs. CANTWELL
& SPRINGMEYER, of Reno, Nevada, and
JOHN E. BENNETT, Esq., 246 Russ Building,
San Francisco, California,

For Defendant and Plaintiff in Error.

[1*]

In the Sixth Judicial District Court of the State of
Nevada, in and for the County of Pershing.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS, Also Known as MILLIE R.
EVANS and MALVINA EVANS,

Defendant.

Complaint.

The plaintiff complains of the defendant and for
cause of action alleges:

FIRST.

On information and belief, that the defendant is
not a resident of the State of Nevada, but resides in
the City and County of San Francisco, State of
California.

*Page-number appearing at foot of page of original certified
Transcript of Record.

SECOND.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, named and known as Fourth Street.

THIRD.

That the defendant was then and there the owner of a certain Ford automobile which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant, and in possession of said automobile as the servant of defendant and driving and operating the same under defendant's direction and control and in the course of his employment.

FOURTH.

That defendant's said servant so negligently and carelessly drove, managed and operated said automobile, that he wilfully and negligently drove said automobile into and against plaintiff with [2] great violence. That the impact with said automobile knocked plaintiff to the ground and said servant then and there drove said automobile over and across plaintiff's body.

FIFTH.

That at the time stated the said servant was driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part.

SIXTH.

That plaintiff is informed and believes, and therefore alleges that the said servant, namely Fred Davis was, at the times herein mentioned under the age of sixteen years, to wit, of the age of fourteen years, and was permitted by said defendant to drive said automobile in violation of the statute in such case made and provided, and especially that certain act, approved March 24th, 1915, entitled "An Act regulating automobiles or motor vehicles on public roads, highways, park or parkways, streets and avenues within the State of Nevada, providing a license for the operation thereof and prescribing penalties for its violation; designating the manner of handling the receipts therefrom and the purpose for which it may be expended and in what manner and repealing an Act of the same title approved March 24, 1913," and the Acts amendatory thereto. That said Fred Davis was incompetent to drive said automobile.

SEVENTH.

That by reason of the force and violence of said automobile running into and over plaintiff, plaintiff became and was then and there badly hurt, bruised, wounded and injured in various parts of his body and particularly about the thighs, arms, back, neck and abdomen, and said plaintiff became and was sick, sore, lame, crippled and disordered and has so remained since the said injury and still continues to remain sick, crippled, lame and disordered, and has suffered and underwent great pain, and still continues to suffer great pain and

mental anguish. That in addition to other and numerous [3] physical injuries plaintiff has, on account of the injuries complained of, suffered, and still continues to suffer from nervous disorders, which have resulted in plaintiff being unable to properly sleep or rest. That plaintiff is advised and believes that his injuries are permanent and that he will continue to suffer from nervous disorders and other pain resulting from his said injuries for a long period of time to come and during the remainder of his natural life.

EIGHTH.

That as a result of said injuries plaintiff has been required to spend divers large sums of money for medical treatment and treatment for his nervous condition and for such purposes has already expended the sum of \$109.70, and the suit of clothes which plaintiff wore at the time of receiving the injuries complained of were then and there ruined by the blows from said automobile. That said suit of clothes was reasonably worth the sum of \$30.00 before the said time of receiving said injuries.

NINTH.

That since the said accident plaintiff has been unable by reason of the injuries received, to attend to his business affairs. That plaintiff is a rancher and manager of a large ranch in Lovelock Valley. That plaintiff is also a geologist and mining expert and before the said injuries were received was able and capable of earning large sums of money in both said business and profession.

TENTH.

That plaintiff's general health has been greatly and generally impaired and broken by reason of the said injuries, and, upon information and belief, that his health will continue to be impaired as a direct result of said injuries.

ELEVENTH.

That by reason of the matter hereinbefore alleged, and the negligence of the said defendant and her said servant this plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE Plaintiff prays judgment against the said defendant for said sum of Fifteen Thousand (\$15,000.00) Dollars, together with [4] his costs and disbursements in this action.

BOOTH B. GOODMAN,

Attorney for Plaintiff.

Address: Lovelock, Nevada.

State of Nevada,

County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 30th day of August, 1919.

BOOTH B. GOODMAN,

Notary Public.

Filed Aug. 30, 1919. J. H. Causten, Clerk.

No. 2270. Filed Decemr. 9th, 1919. T. J. Edwards, Clerk U. S. Dist. Court, Dist. of Nevada.
[5]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answer.

Now comes the defendant, and answering unto
the complaint of plaintiff herein, for answer says:

I.

Defendant admits the matters and things in the
first paragraph of the complaint stated.

II.

Defendant denies that on the 28th day of July,
1919, or at any time, or at all, plaintiff was law-
fully walking across a public street and thorough-
fare of the city of Lovelock, county of Pershing,
State of Nevada, named and known as Fourth
Street, or was walking across said street in any
manner, or at all, except in an unlawful, careless,
negligent, and indifferent manner.

III.

Defendant admits the matters and things in the
third paragraph of plaintiff's complaint contained.

IV.

Defendant denies that her said servant drove the said automobile into or against plaintiff, or with great violence, or at all. Denies that he negligently or carelessly drove the said automobile or managed or operated the said automobile, or that he wilfully, or otherwise, or at all, or negligently, or otherwise, or at all, drove the said automobile into or against plaintiff with great violence, or any violence, or at all. Denies that the impact with said automobile knocked plaintiff to the ground, or elsewhere, or at all; and denies that defendant's said servant inflicted upon plaintiff any impact [6] by said machine, or otherwise, or at all, and denies that said servant then and there drove said automobile over, or across, plaintiff's body or did so drive at any time, whatsoever.

V.

Denies that at the time stated in said complaint, or at any time, or at all, defendant's said servant was driving said automobile at an unreasonable, or dangerous, or excessive rate of speed, or in a negligent, or careless, or dangerous manner; but alleges that said servant was then and there, and at all times in said complaint mentioned, driving said automobile when the same was driven by said servant, in a cautious and lawful and careful manner and at a low rate of speed; and denies that plaintiff was at all or any of the times mentioned in the said complaint exercising due care, or any care, or caution, on his part, but alleges that plaintiff's manner was grossly careless and incautious, and that the alleged acci-

dent in said complaint complained of was precipitated and occasioned through the negligence of plaintiff.

VI.

Denies that the defendant's said servant, Fred Davis, was incompetent to drive the said automobile, and avers that the said servant, Fred Davis, was, and is, a competent, cautious, and careful driver of said automobile, and experienced in driving the same; and defendant denies, on her information and belief, that the said Fred Davis was of the age of fourteen years, or was under the age of sixteen years; and denies that he was permitted by defendant to drive said automobile in violation of the Act of March 24th, 1913, as in said complaint set forth, entitled "An Act Regulating Automobiles Within the State of Nevada," and Acts amendatory thereof, or of any other Act or Acts of the State of Nevada, whatsoever.

VII.

Denies that by reason of the force and violence, or force or violence, of said automobile running into, or over, plaintiff, plaintiff became or was then and there, or at any time badly hurt, or hurt at all, or bruised or wounded, or injured, in various, or any, parts [7] of his body, or at all, or particularly, or otherwise, about the thighs, or arms, or back, or neck, or abdomen, or elsewhere, or at all; denies that plaintiff became, or was sick, or sore, or lame, or crippled, or disordered, and denies that he has so remained since said alleged injury, or that plaintiff was injured in any way, or at all, by said

automobile, or by defendant's said servant, and denies that plaintiff has so remained since said alleged injury, or that he suffered any injury; and denies that he still continues to remain sick, or crippled, or lame, or disordered; and denies that he has suffered, or underwent great or any pain, or mental anguish, or any anguish. Denies that on account of the injuries complained of, or that there were any such injuries, plaintiff suffered, or still continues to suffer, from nervous disorders, or any disorders, or that they have resulted in plaintiff being unable to properly, or in any manner, sleep, or rest. Denies that plaintiff is advised, or believes, that such injuries are permanent, or that they are permanent, or that plaintiff has any ground whatever for believing them to be permanent, or that there were any such injuries as plaintiff describes, or at all; and denies that he is advised, or believes, that by reason of said alleged injuries plaintiff will continue to suffer from nervous disorders, or any disorders, or other, or any, pain resulting from said injuries for a long, or any, period of time, or at all, or that he suffers from nervous, or any, disorders or pain therefrom.

VIII.

Denies that as a result of said alleged injuries plaintiff has been required to spend divers, or any, large, or any, sums of money for medical treatment, or treatment, for his nervous condition, or any other condition, and denies that for such purpose he has already expended the sum of \$109.70, or any other sum or sums; and denies that the suit of clothes

which plaintiff wore at the time of receiving the alleged injuries complained of were ruined or injured by the alleged blows received from said automobile, or that plaintiff received any blow, or blows, from said automobile. [8]

IX.

Denies that since the said alleged accident plaintiff has been unable, by reason of the injuries received, to attend to his business affairs. Defendant alleges that she has no information or belief upon which to answer the allegation that plaintiff is a rancher, or manager, of a large ranch in Lovelock Valley, or elsewhere, also that plaintiff is a geologist and mining expert; hence, denies the same; and denies that before said alleged injuries were received, and denies that any injuries whatever were received, plaintiff was able or capable of earning large sums, or any sums, of money in both, or either, of said businesses or professions; and avers that plaintiff has been in any manner incapacitated or disabled in the performance of any business he might have been able to do prior to said alleged accident, by reason of said alleged accident; and avers that plaintiff was not injured by said alleged accident.

X.

Denies that plaintiff's general health has been greatly, or generally, impaired, or broken, by reason of the said alleged injuries, and denies that upon information or belief, or at all, or that plaintiff has any such information or belief, that his health will continue to be impaired as a direct result of said

alleged injuries, or as any result thereof, or that his health will be so impaired in consequence of such alleged injuries, or that there were any injuries.

XI.

Denies that by reason of any matters in the complaint alleged, or the negligence of defendant, or of her said servant, plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars, or of any sum whatsoever, or at all.

WHEREFORE, defendant having answered unto the complaint herein, prays that she may be hence dismissed with her proper costs.

W. M. KEARNEY and
JOHN E. BENNETT,
Solicitors for Defendant. [9]

State of California,
City and County of San Francisco,—ss.

Millie L. Evans being first duly sworn, deposes and says: She is the defendant in the above-entitled action; that she has read the answer herein and knows the contents thereof and the same is true of her own knowledge, except as therein stated on her information or belief and as to those facts she believes it to be true.

MILLIE L. RODGERS,
Formerly Millie L. Evans.

Subscribed and sworn to this 6th day of December, 1919, before me.

[Seal] E. J. CASEY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Answer. Filed Decr. 20th, 1919. T. J. Edwards, Clerk. William M. Kearney and John E. Bennett, Reno, Nevada, Attorneys for Defendant.

No. 2270. U. S. Dist. Court, Dist. of Nevada. Daniel vs. Evans. Plffs. Ex. No. 22. Fided June 2, 1921. E. O. Patterson, Clerk. [10]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that this action was originally commenced in the District Court of the State of Nevada, in and for the County of Pershing, by the issuance of a summons dated August 30, 1919, which, together with a copy of the complaint, was served on the defendant Millie L. Evans (now Millie L. Jones), on or about October 29, 1919, who thereafter and on or about the 28th day of November, 1919, duly appeared by W. M. Kearney and John E. Bennett, her attorneys. Thereafter and on or about the 6th day of December, 1919, this action

was duly removed to the United States District Court for the District of Nevada on petition and motion of the defendant, setting up the grounds of diversity of citizenship; that thereafter and on or about the 20th day of December, 1919, an answer was duly filed and served upon the plaintiff; that thereafter and on or about the 4th day of February, 1921, the plaintiff served upon the defendant and filed with the Clerk of the above-entitled court his amended complaint; that thereafter on or about the 14th day of February, 1921, the defendant filed her answer to the amended complaint and served a copy thereof upon the plaintiff's attorney; that thereafter, to wit, on or about the 24th day of February, 1921, the plaintiff filed his reply to defendant's answer to the amended complaint and served a copy upon defendant's attorney.

The original and amended pleadings in the cause herein are as follows: [11]

In the Sixth Judicial District Court of the State of Nevada, in and for the County of Pershing.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS, also Known as MILLIE R.
EVANS and MALVINA EVANS,

Defendant.

Complaint.

The plaintiff complains of the defendant and for cause of action alleges:

FIRST.

On information and belief, that the defendant is not a resident of the State of Nevada, but resides in the City and County of San Francisco, State of California.

SECOND.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, named and known as Fourth Street.

THIRD.

That the defendant was then and there the owner of a certain Ford automobile which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant, and in possession of said automobile as the servant of defendant and driving and operating the same under defendant's direction and control and in the course of his employment.

FOURTH.

That defendant's said servant so negligently and carelessly drove, managed and operated said automobile, that he wilfully and negligently drove said automobile into and against plaintiff with great violence. That the impact with said automobile knocked plaintiff to the ground and said servant then and there drove said automobile [12] over and across plaintiff's body.

FIFTH.

That at the time stated the said servant was

driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part.

SIXTH.

That plaintiff is informed and believes, and therefore alleges that the said servant, namely Fred Davis, was, at the times herein mentioned under the age of sixteen years, to wit, of the age of fourteen years, and was permitted by said defendant to drive said automobile in violation of the statute in such case made and provided, and especially that certain Act, approved March 24th, 1915, entitled "An Act regulating automobiles or motor vehicles on public roads, highways, park or parkways, streets and avenues within the State of Nevada; providing a license for the operation thereof and prescribing penalties for its violation; designating the manner of handling the receipts therefrom and the purpose for which it may be expended and in what manner and repealing an Act of the same title approved March 24, 1913," and the Acts amendatory thereto. That said Fred Davis was incompetent to drive said automobile.

SEVENTH.

That by reason of the force and violence of said automobile running into and over plaintiff, plaintiff became and was then and there badly hurt, bruised, wounded and injured in various parts of his body and particularly about the thighs, arms, back, neck and abdomen, and said plaintiff became

and was sick, sore, lame, crippled and disordered and has so remained since the said injury and still continues to remain sick, crippled, lame and disordered, and has suffered and underwent great pain, and still continues to suffer great pain and mental anguish. That in addition to other and numerous physical injuries plaintiff has, on account of the injuries complained of, suffered, and still continues to suffer from nervous disorders, which have resulted in plaintiff being unable to properly sleep or [13] rest. That plaintiff is advised and believes that his injuries are permanent and that he will continue to suffer from nervous disorders and other pain resulting from his said injuries for a long period of time to come and during the remainder of his natural life.

EIGHTH.

That as a result of said injuries plaintiff has been required to spend divers large sums of money for medical treatment and treatment for his nervous condition, and for such purposes has already expended the sum of \$109.70, and that the suit of clothes which plaintiff wore at the time of receiving the injuries complained of were then and there ruined by the blows from said automobile. That said suit of clothes was reasonably worth the sum of \$30.00 before the said time of receiving said injuries.

NINTH.

That since the said accident plaintiff has been unable by reason of the injuries received, to attend to his business affairs. That plaintiff is a rancher

and manager of a large ranch in Lovelock Valley. That plaintiff is also a geologist and mining expert and before the said injuries were received was able and capable of earning large sums of money in both said business and profession.

TENTH.

That plaintiff's general health has been greatly and generally impaired and broken by reason of the said injuries, and, upon information and belief, that his health will continue to be impaired as a direct result of the said injuries.

ELEVENTH.

That by reason of the matters hereinbefore alleged, and the negligence of the said defendant and her said servant this plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE Plaintiff prays judgment against the said defendant for said sum of Fifteen Thousand (\$15,000.00) Dollars, together with his costs and disbursements in this action.

BOOTH B. GOODMAN,

Attorney for Plaintiff.

Address: Lovelock, Nevada. [14]

State of Nevada,

County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge excepting as to matters therein stated upon information

and belief, and as such matters he believes it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 30th day of August, 1919.

[Seal]

BOOTH B. GOODMAN,
Notary Public.

I hereby certify that the foregoing is a full, true and correct copy of the complaint filed in the above-entitled action.

BOOTH B. GOODMAN.

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answer.

Now comes the defendant, and answering unto the complaint of plaintiff herein, for answer says:

I.

Defendant admits the matters and things in the first paragraph of the complaint stated.

II.

Defendant denies that on the 28th day of July, 1919, or at any time, or at all, plaintiff was lawfully walking across a public street and thoroughfare in the city of Lovelock, County of Pershing, [15]

State of Nevada, named and known as Fourth Street, or was walking across said street in any manner, or at all, except in an unlawful, careless, negligent, and indifferent manner.

III.

Defendant admits the matters and things in the third paragraph of plaintiff's complaint contained.

IV.

Defendant denies that her said servant drove the said automobile into or against plaintiff, or with great violence, or at all. Denies that he negligently or carelessly drove the said automobile, or managed or operated the said automobile, or that he wilfully, or otherwise, or at all, or negligently, or otherwise, or at all, drove the said automobile into or against plaintiff with great violence, or any violence, or at all. Denies that the impact with said automobile knocked plaintiff to the ground, or elsewhere, or at all; and denies that defendant's said servant inflicted upon plaintiff any impact by said machine or otherwise, or at all, and denies that said servant then or there drove said automobile over, or across plaintiff's body, or did so drive at any time, whatsoever.

V.

Denies that at the time stated in said complaint, or at any time, or at all, defendant's said servant was driving said automobile at an unreasonable, or dangerous or excessive rate of speed, or in a negligent, or careless, or dangerous manner; but alleges that said servant was then and there, and at all times in said complaint mentioned, driving

said automobile, when the same was driven by said servant, in a cautious and lawful and careful manner and at a low rate of speed; and denies that plaintiff was at all or any of the times mentioned in the said complaint exercising due care, or any care, or caution, on his part, but alleges that plaintiff's manner was grossly careless and incautious, and that the alleged accident in said complaint complained of was precipitated and occasioned through the negligence of plaintiff. [16]

VI.

Denies that the defendant's said servant, Fred Davis, was incompetent to drive the said automobile, but avers that the said servant, Fred Davis, was, and is, a competent, cautious, and careful driver of said automobile, and experienced in driving the same; and defendant denies, on her information and belief, that the said Fred Davis was of the age of fourteen years, or was under the age of sixteen years; and denies that he was permitted by defendant to drive said automobile in violation of the Act of March 24th, 1913, as in said complaint set forth, entitled "An Act Regulating Automobile within the State of Nevada," and Acts amendatory thereof, or of any other Act or Acts of the State of Nevada, whatsoever.

VII.

Denies that by reason of the force and violence, or force or violence, of said automobile running into, or over, plaintiff, plaintiff became or was then or there, or at any time, badly hurt, or hurt at all,

or bruised, or wounded, or injured, in various, or any, parts of his body, or at all, or particularly, or otherwise, about the thighs, or arms, or back, or neck, or abdomen, or elsewhere, or at all; denies that plaintiff became, or was, sick, or sore, or lame, or crippled, or disordered, and denies that he has so remained since said alleged injury, or that plaintiff was injured in any way, or at all, by said automobile, or by defendant's said servant, and denies that plaintiff has so remained since said alleged injury, or that he suffered any injury; and denies that he still continues to remain sick, or crippled, or lame, or disordered; and denies that he has suffered, or underwent great or any pain, or mental anguish, or any anguish. Denies that on account of the injuries complained of, or that there were any such injuries, plaintiff suffered, or still continues to suffer, from nervous disorders, or any disorders, or that they have resulted in plaintiff being unable to properly, or in any manner, sleep, or rest. Denies that plaintiff is advised, or believes, that such injuries are permanent, or that they are permanent, or that plaintiff has any ground whatever for believing them to be permanent, or that there were any such injuries as plaintiff describes [17] or at all; and denies that he is advised, or believes, that by reason of said alleged injuries plaintiff will continue to suffer from nervous disorders, or any disorders, or other, or any, pain resulting from said injuries for a long, or any, period of time, or at all, or that he suffers from nervous or any disorders or pain therefrom.

VIII.

Denies that as a result of said alleged injuries plaintiff has been required to spend divers, or any, large, or any, sums of money for medical treatment, or treatment, for his nervous condition, or any other condition, and denies that for such purposes he has already expended the sum of \$109.70, or any other sum or sums; and denies that the suit of clothes which plaintiff wore at the time of receiving the alleged injuries complained of were ruined or injured by the alleged blows received from said automobile, or that plaintiff received any blow, or blows, from said automobile.

IX

Denies that since the said alleged accident plaintiff has been unable, by reason of the injuries received, to attend to his business affairs. Defendant alleges that she has no information or belief upon which to answer the allegation that plaintiff is a rancher, or manager, of a large ranch in Lovelock Valley, or elsewhere, also that plaintiff is a geologist and mining expert; hence, denies the same; and denies that before said alleged injuries were received, and denies that any injuries whatever were received, plaintiff was able or capable of earning large sums, or any sums, of money in both, or either of said businesses or professions; and avers that plaintiff has been in no manner incapacitated or disabled in the performance of any business he might have been able to do prior to said alleged accident, by reason of said alleged accident; and avers that plaintiff was not injured by said alleged accident.

X.

Denies that plaintiff's general health has been greatly, or generally, impaired, or broken, by reason of the said alleged injuries, and denies that upon information or belief, or at all, or [18] that plaintiff has any such information or belief, that his health will continue to be impaired as a direct result of said alleged injuries, or as any result thereof, or that his health will be so impaired in consequence of such alleged injuries, or that there were any injuries.

XI.

Denies that by reason of any matters in the complaint alleged, or the negligence of defendant, or of her said servant, plaintiff has been damaged in the sum of fifteen thousand (\$15,000.00) dollars, or of any sum whatsoever, or at all.

WHEREFORE, Defendant having answered unto the complaint herein, prays that she may be hence dismissed with her proper costs.

JOHN E. BENNETT,
W. M. KEARNEY,
Solicitors for Defendant.

State of California,
City and County of San Francisco,—ss.

Millie L. Evans, being first duly sworn, deposes and says: She is the defendant in the above-entitled action; that she has read the answer herein and knows the contents thereof and the same is true of her own knowledge, except as therein stated on

her information or belief and as to those facts she believes it to be true.

MILLIE L. RODGERS,
Formerly Millie L. Evans.

Subscribed and sworn to this 6th day of December, 1919, before me.

E. J. CASEY,
Notary Public in and for the City and County of
San Francisco, State of California.

I, W. M. Kearney, one of the solicitors for the defendant in the above-entitled matter, do hereby certify that the foregoing is a full, true and correct copy of defendant's answer filed in the above-entitled matter on the —— day of December, 1919.

W. M. KEARNEY. [19]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Amended Complaint.

The plaintiff complains of the defendant and for cause of action alleges:

FIRST.

That the defendant is and at all times hereinafter mentioned was the owner of those certain ranches situated in Pershing County, Nevada,

known as "Reservation" ranches or "Rodgers" ranches.

SECOND.

That at the times hereinafter mentioned one Fred Davis was then and there a servant in the employ of the said defendant and whose duty embraced the business of conveying employees and workmen to and from the ranches of the defendant to the city of Lovelock and conveying supplies and messages between the said city of Lovelock and said defendant's ranches. That in the course of his employment the said Fred Davis used and was in possession of an automobile furnished to him by defendant and the property of the defendant, and which automobile he was, at the time hereinafter mentioned, operating in the regular course of his employment and under the direction and control of the said defendant through her duly authorized superintendent and ranch manager, W. R. McCulloch.

THIRD.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, then named and known as Fourth Street, but since named Main Street. That the defendant's said servant, Fred Davis, was at the same time and date and in the [20] course of his employment, on the said street and driving an automobile owned by the defendant as aforesaid.

FOURTH.

That defendant's said servant, Fred Davis, so

negligently and carelessly drove, managed and operated said automobile that he wilfully and negligently drove said automobile into and against plaintiff with great violence. That the impact with said automobile knocked plaintiff to the ground and said servant then and there drove said automobile over and across plaintiff's body.

FIFTH.

That at the time stated the said servant was driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part. That such rate of speed at which the said servant was driving the said automobile, at the time he drove the same upon and over plaintiff, was in excess of twelve miles per hour and in violation of Ordinance Number 4 of the City of Lovelock prohibiting the driving of motor vehicles upon the streets within the city limits and particularly the street mentioned at a rate of speed greater than twelve miles per hour.

SIXTH.

That plaintiff is informed and believes, and therefore alleges that the said servant, namely Fred Davis, was, at the times herein mentioned, under the age of sixteen years, to wit, of the age of fourteen years, and was permitted by said defendant to drive said automobile in violation of the statute in such case made and provided, and especially that certain Act, approved March 24th, 1915, entitled "An Act regulating automobile or motor vehicles

on public roads, highways, park or parkways, streets and avenues within the State of Nevada; providing a license for the operation thereof and prescribing penalties for its violation; designating the manner of handling the receipts therefrom and the purpose for which it may be expended and in what manner, and repealing an Act of the same title approved March 24, 1913'' and the Acts amendatory thereto. That said Fred Davis was incompetent to drive said automobile. [21]

SEVENTH.

That by reason of the force and violence of said automobile running into and over plaintiff, plaintiff became and was then and there badly hurt, bruised, wounded and injured in various parts of his body and particularly about the thighs, arms, back, neck and abdomen; and said plaintiff became and was sick, sore, lame, crippled and disordered and has so remained since the said injury and still continues to remain sick, crippled, lame and disordered, and has suffered and underwent great pain, and still continues to suffer great pain and mental anguish. That in addition to other and numerous physical injuries plaintiff has, on account of the injuries complained of, suffered, and still continues to suffer from nervous disorders, which have resulted in plaintiff being unable to properly sleep or rest. That plaintiff is advised and believes that his injuries are permanent and that he will continue to suffer from nervous disorders and other pain resulting from his said injuries for a long period of

time to come and during the remainder of his natural life.

EIGHTH.

That as a result of said injuries plaintiff has been required to spend divers large sums of money for medical treatment and treatment for his nervous condition and for such purposes has already expended the sum of \$432.21, and that the suit of clothes which plaintiff wore at the time of received the injuries complained of were then and there ruined by the blows from said automobile. That said suit of clothes was reasonably worth the sum of \$30.00 before the said time of receiving said injuries.

NINTH.

That since the said accident plaintiff has been unable by reason of the injuries received, to attend to his business affairs. That plaintiff is a rancher and manager of a large ranch in Lovelock Valley. That plaintiff is also a geologist and mining expert and before the said injuries were received was able and capable of earning large sums of money in both said business and profession.

TENTH.

That plaintiff's general health has been greatly and generally [22] impaired and broken by reason of the said injuries, and, upon information and belief, that his health will continue to be impaired as a result of the said injuries. That plaintiff's health has grown steadily worse since the said injury because of what plaintiff is informed and believes to be great and serious double lateral

curvatures of the spine and posterior and anterior curvatures of the spine and the displacement of other bones. That plaintiff has suffered therefrom a general decline in health attended by kidney and bladder troubles in addition to heart disturbances which have caused him weak and sick spells which have been recurring with greater and greater frequency.

ELEVENTH.

That by reason of the matters hereinbefore alleged, and the negligence of the said defendant and her said servant this plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE Plaintiff prays judgment against the said defendant for said sum of Fifteen Thousand (\$15,000.00) Dollars, together with his costs and disbursements in this action.

ROBT. RICHARDS and
BOOTH B. GOODMAN,
Attorneys for Plaintiff.
Address: Lovelock, Nevada.

State of Nevada,
County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing Amended Complaint and knows the contents thereof and the same is true of his own knowledge excepting as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 2d day of Feb. 1921.

[Seal]

BOOTH B. GOODMAN. [23]

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answer to Amended Complaint.

Comes now the defendant, and for answer to the amended complaint of plaintiff, admits, denies and alleges as follows:

I.

For answer to paragraph numbered "Second" of the complaint, defendant denies that at the times mentioned in the complaint, or at any other time, or at all, one Fred Davis was a servant in the employ of defendant; denies that in the course of his employment said Fred Davis used and was in the possession of, or used or was in the possession of, an automobile furnished to him by the defendant and the property of the defendant, or of an automobile furnished to him by the defendant, or which he was operating in the regular course of his employment and under the direction and control of defendant through her ranch superin-

tendent and ranch manager W. R. McCulloch, or which he was operating in any other manner under the direction or control of defendant.

II.

Answering paragraph numbered "Third" of plaintiff's complaint, defendant denies all the allegations in said paragraph contained save and except that at the time alleged in said paragraph Fred Davis was on the street therein named driving an automobile owned by defendant, and in this behalf defendant is informed and believes and therefore, on such information and belief, alleges the fact to be that plaintiff was then and there walking upon and across said street in an unlawful, careless, negligent and indifferent manner.

III.

The defendant denies all the allegations contained in paragraph [24] numbered "Fourth" of plaintiff's complaint.

IV.

With regard to the allegations contained in paragraphs numbered "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth" and "Eleventh," the defendant says that she has not knowledge or information upon which to base a belief, and therefore, basing her denial upon that ground, she denies all the allegations in each of the said paragraphs contained.

For further answer by way of new matter constituting a defense to plaintiff's complaint, defendant alleges.

I.

That defendant's true name is Millie L. Rodgers, and not Millie L. Evans, as entered in plaintiff's amended complaint.

II.

That in the month of July, 1919, defendant was the owner of those certain ranches situated in Pershing County, Nevada, known and described as the Reservation of Rodgers ranches, and of a Ford automobile driven and operated by one Fred Davis, who was an employee of said ranches. That the defendant was not then in the possession or control of said ranches or automobile, but the same were in the possession and under the control of Elizabeth A. Rodgers, the mother of this defendant, and said automobile was being driven and operated by said Fred Davis as the employee and agent of said Elizabeth A. Rodgers, all under an oral lease and agreement whereby said Elizabeth A. Rodgers had the possession, control and operation of said ranches and automobile, paying the defendant as rental therefor one-half ($\frac{1}{2}$) of the annual net proceeds derived from such possession, control and operation.

III.

That defendant is informed and believes, and upon such information and belief alleges the facts to be that on or about July 28, 1919, while said Fred Davis was driving said automobile in a lawful, cautious and careful manner and with the exercise of due and reasonable care upon and along the right side of a street in the City of Lovelock,

Pershing County, State of Nevada, then called and known as [25] Fourth Street but now called and known as Main Street, plaintiff did unlawfully, negligently, carelessly and recklessly and without due or any care or caution, walk diagonally across said street in the middle of the block and not upon a pedestrian's thoroughfare, and did so unlawfully, negligently, carelessly recklessly and without due or any care or caution, walk and cross in front of said automobile in such a manner that said Fred Davis could not in the exercise of due and reasonable care and caution prevent the said automobile from colliding with and striking said plaintiff, and that said automobile did then and there collide with and strike said plaintiff, although he, said plaintiff, had the last clear chance to escape said collision in that he could have avoided said car by looking around and stepping aside so as to let said automobile pass; that plaintiff sustained only minor injuries as a result of said collision, immediately afterwards walked away unaided, did not at any time suffer serious pain or injury therefrom, and was not damaged to any extent whatsoever thereby.

WHEREFORE, defendant prays judgment that plaintiff take nothing by his amended complaint, and that defendant be dismissed hence with her costs.

W. M. KEARNEY and
JOHN E. BENNETT,
Solicitors for Defendant.

State of California,

City and County of San Francisco,—ss.

Millie L. Rodgers, being first duly sworn, says: That she was formerly named Millie L. Evans and that she is defendant in the action entitled above, that she has read the above and foregoing amended answer; and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated on information or belief and as to them that she believes it to be true.

MILLIE L. RODGERS.

Subscribed and sworn to before me this 12th day of February, A. D. 1921.

[Seal]

J. D. BROWN,

Notary Public.

Notary Public in and for the City and County of San Francisco, State of California. [26]

I, W. M. Kearney, do hereby certify that I am solicitor for the defendant; that the foregoing is a true and correct copy of the answer to plaintiff's amended complaint in said action on file in the office of the Clerk of the above-entitled court and of the whole thereof.

W. M. KEARNEY,
Solicitor for Defendant. .

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Reply.

Comes now the plaintiff and replying to the defendant's answer to the amended complaint, admits, denies and alleges as follows:

I.

Replying to paragraph II, plaintiff denies that he was *the* the time mentioned, then and there walking upon and across said street in an unlawful, careless, negligent and indifferent manner.

II.

Replying to paragraph II, containing the new matter, constituting an alleged offense, to plaintiff's complaint, plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that no oral lease or other lease existed at the times mentioned in plaintiff's complaint, between the defendant and Elizabeth A. Rogers, whereby said Elizabeth A. Rogers had the possession, control and operation of said ranches and automobile.

III.

Replying to paragraph III, plaintiff denies that said Fred Davis was driving said automobile in a

lawful, cautious and careful manner, and with the exercise of due and reasonable care, and denies [27] that the plaintiff did unlawfully, negligently, carelessly and recklessly and without due, or any care or caution, walk diagonally across said street in the middle of the block, and denies that he did unlawfully, negligently, carelessly or recklessly, and without due care or caution, walk and cross in front of said automobile in such manner that said Fred Davis could not, in the exercise of due and reasonable care and caution, prevent the said automobile from colliding with and striking plaintiff, and denies that plaintiff had the last clear chance, or any reasonable chance to escape said collision, and alleges the fact to be that plaintiff did use effort to avoid said collision and did then and there attempt to avoid said collision, and plaintiff further denies that he did not suffer serious pain and injury from said collision, and denies that he was not damaged as stated and alleged in his complaint, or to a greater amount than therein stated.

THEREFORE, Plaintiff prays that he be granted the relief demanded in his complaint.

ROBT. RICHARDS and
BOOTH B. GOODMAN,
Solicitors for Plaintiff.

State of Nevada,
County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: I am the plaintiff in the above-entitled action; I have read the foregoing reply and know the

contents thereof; that the same is true of my own knowledge, except as to matters therein stated as to information and belief, and as to such matters, I believe it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 19th day of February, 1921.

[Seal]

BOOTH B. GOODMAN,

Notary Public.

Certified a true and correct copy.

BOOTH B. GOODMAN. [28]

The case came on to be tried and was tried before a jury on the 1st day of June, 1921, and was concluded on the 4th day of June, 1921. The plaintiff appeared by his attorneys Booth B. Goodman and Robert Richards, and the defendant appeared by her attorneys William M. Kearney and Cantwell & Springmeyer. Hon. E. S. Farrington, District Judge in and for the above District presided and the following proceedings were had, to wit:

In the District Court of the United States, in and for the District of Nevada.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

This case came on for trial in the above-entitled court on Wednesday, June 1st, 1921, at 10 o'clock A. M. of said day, before the Honorable E. S. Farrington, Judge of said Court, and a jury, a jury having been duly and regularly impaneled and sworn to try said case; Mr. Booth B. Goodman and Mr. Robert Richards appearing as attorneys for the Plaintiff, and Mr. William M. Kearney and Mr. George Springmeyer appearing as attorneys for the Defendant;

Whereupon the following proceedings were had and testimony introduced:

The pleadings were read by the respective counsel, and at 12 o'clock, the Court admonishes the jury, and a recess is taken until 1:30 o'clock P. M.

AFTER RECESS—1:30 P. M.

The clerk calls the roll of jurors. All present.

Upon request of counsel for the defendant, all witnesses in attendance for plaintiff and defendant, are marshaled, sworn, and placed under the rule.
[29]

Testimony of J. B. Daniel, in His Own Behalf.

Mr. J. B. DANIEL, the plaintiff, called as a witness in his own behalf, after being sworn, testified as follows:

Direct Examination by Mr. GOODMAN.

Q. Please state your full name?

A. Johnson Barton Daniel.

Q. You usually go by the initials merely J. B. Daniel, do you not? A. J. B. Daniel.

Q. Where do you reside, Mr. Daniel?

(Testimony of J. B. Daniel.)

A. At Lovelock.

Q. That is Lovelock, Nevada? A. Nevada.

Q. How long have you resided in Lovelock?

A. Since the summer of 1916.

Q. Are you engaged in business there, or have you been?

A. I am engaged in ranching at the present time.

Q. How long have you been engaged in ranching?

A. Since 1915.

Q. Have you any other profession or business?

A. Why, I am a professional mining engineer.

Q. Did you follow that occupation previous to the time you commenced ranching?

A. Well, since about 1880.

Q. And have you specialized in any particular branch of mining engineering?

A. The general subject of mining, examining mines and operating mines, and geology, assaying, chemistry; those things that pertain to the general line of mining.

Q. You are married? A. I am.

Q. And your wife resides with you at Lovelock, Nevada? A. Lovelock, Nevada.

Q. Are you acquainted with the defendant in this case, Millie L. Rodgers?

A. I know her, I am not personally acquainted with her.

Q. You have never met her?

A. I have never met her.

Q. Are you acquainted with Fred Davis?

A. I met him on one occasion.

(Testimony of J. B. Daniel.)

Q. When was that, Mr. Daniel?

A. When he ran over me with an automobile.

Q. Can you give the date?

A. The 28th of July, 1919. [30]

Q. And where did this occur, Mr. Daniel?

A. Lovelock, Nevada.

Q. Will you state fully to the Court and jury just what occurred at the time you were run over by an automobile?

A. I had gone to the office of the county commissioners to see about an appraisement of rates—

Mr. SPRINGMEYER.—Object on the ground it is not responsive to the question.

Mr. GOODMAN.—Merely preliminary.

The COURT.—If there is anything immaterial in the answer you can strike it out later. Go on.

WITNESS.—(Contg.) And coming from there I was going to the postoffice; getting to the pavement I looked up and down the street, as I always did, for automobiles; the street was very—was sparse of automobiles; there were two parked on the far end of the street on the south side, and one on the north side, down on the lower part of the street; nothing coming or going. I stepped into the street and looked again, and went on; and about halfway across the street I looked again, and an automobile was coming up; I simply paused to see on which side it was coming, either back of me or front of me, and the direction was back of me, and I proceeded; I hadn't gone but a few steps till I saw the automobile again coming directly for me, and I

(Testimony of J. B. Daniel.)

hastened my steps, and in three or four seconds—I did as well as I could—I jumped; I saw the automobile was coming to me right square, and I was struck by the center, and I threw myself over, and I was struck by the right mud-guard of the automobile, and I knew nothing more then until I found myself, my eyes open, I found myself under the automobile, and the rear wheel was coming toward me.

Mr. GOODMAN.—(Q.) Did you witness the rear wheel across your body?

A. Yes, I witnessed it; it crossed me right here (indicating).

Q. You stated that you were coming from a place that you went to consult with the commissioners; in what building was that?

A. That was in the Lovelock Mercantile Store Company Building.

Q. On what street is the postoffice in Lovelock, Nevada?

A. On what they call now Main Street, formerly Fourth Street. [31]

Mr. GOODMAN.—If the Court please, counsel has stipulated with me that this plat on the board, and I have stipulated with them that their plat, may be admitted and used without calling a witness to prove it.

The COURT.—Very well.

Mr. GOODMAN.—(Q.) Mr. Daniel, who prepared this plat? A. I prepared it.

Q. What does it represent?

(Testimony of J. B. Daniel.)

A. It represents the street on which I and the automobile were; it represents the buildings on each side of the street.

Q. Does it show the building you came from when you crossed to the postoffice? A. Yes.

Q. Will you please mark out or designate so the jury may see it, your course, just where you came from, and the course you took in crossing the street?

A. Here is the stairway that leads up to the second floor of the Mercantile Building (indicating on plat); coming down the stairway I took this course here; here is the pair of steps; here is an automobile supply station; I cut right across there, toward there, to go to the postoffice, coming down the stairway, this is the pavement; that is the course right straight over here, in a straight line (indicating).

Q. Now, Mr. Daniel, about where were you on the street when you first observed the automobile?

A. I was about in here, a little more than half-way across.

Q. And where were you approximately on the street, or as near as you can state, when the automobile first struck you?

A. About fourteen feet from the curb, about there (indicating on plat); it ran over me about eight feet from where it struck me.

Q. Please mark the place where it struck you as close as possible on the map. (Witness marks the point as requested on the plat.)

(Testimony of J. B. Daniel.)

A. And the place where it ran over me?

Q. Did you testify on that? Did the automobile when it struck you knock you down and run over you?

A. Knocked me down, I found myself on the ground. [32]

Q. You can't remember anything until—

A. (Intg.) Nothing until the rear wheel—I saw the rear wheel about that near me (showing) when I came to my senses, and run over my leg here, right across that way (indicating).

Q. Mr Daniel, on what spot, or approximately what spot were you after the automobile had passed over you?

A. About here (indicating on plat); about eight feet from—practically eight feet—from where it struck me.

Q. After the automobile had passed over you, you regained consciousness, and got up? A. Yes.

Q. Did you at that time observe where the automobile which had run over you, was standing?

A. It was standing over here (indicates on plat).

Q. Mark that point two, Mr. Daniel.

(The witness marks the point on the map as directed.)

Q. Have you ever on any occasion measured the distance to this spot which you have designated as being the spot where the automobile was standing, and the spot where you say you were struck?

A. Yes; eighty feet.

(Testimony of J. B. Daniel.)

Q. Eighty feet to the back of the car or front of the car?

A. Eighty feet to the front of the car.

Q. Mr. Daniel, have you had any experience in handling or driving automobiles?

A. Well, I have been driving an automobile for sixteen years.

Q. And during your experience in driving automobiles, have you from observation of speedometers, or otherwise, observed the rate at which automobiles travel? A. Yes.

Q. Did you form any opinion from your experience as to the speed at which the automobile was traveling at the time it struck you?

A. It was travelling all of twenty miles an hour.

Mr. KEARNEY.—I move the answer be stricken on the ground the plaintiff has not qualified as an expert on the rate of speed of cars; it is merely a conclusion without the proper foundation having been laid. The fact that a man has operated an automobile for sixteen years is no evidence that he is qualified as an expert to testify from observation, merely looking at a car, as to its speed. [33]

Mr. GOODMAN.—The rule is well known and generally accepted on matters of this kind, that opinion evidence is competent; and an automobile, as the Court takes judicial notice, has become so common most any person is competent to give opinion testimony as to the speed at which a car is going.

(Testimony of J. B. Daniel.)

By The COURT.—(Q.) Did you observe how fast that car was traveling, Mr. Daniel?

A. I should judge coming all of twenty miles an hour.

Q. I am not asking you how fast it was going, but I am asking you whether you noticed how fast it was going?

A. Well, it was coming—I don't understand exactly, your Honor. It was coming toward me.

Q. You gave your judgment as to how fast it was coming, how did you form such a conclusion as that?

A. Oh, from experience in observing automobiles travel.

Q. Well, you must have seen it and noticed its speed in order to give any judgment?

A. Exactly.

Q. Did you notice its speed at the time?

A. I noticed its speed, coming rapidly; I noticed its speed coming at least twenty miles an hour, as I say.

The COURT.—Well, I will let that stand for what it is worth.

Mr. GOODMAN.—(Q.) After you had this accident, Mr. Daniel, what did you do, did you go home?

A. I went into the postoffice; I was very much shaken up, partially dazed, but I walked into the postoffice, to the rear of the postoffice, and out again, I didn't get my mail, and on home; I am not living very far from the postoffice.

(Testimony of J. B. Daniel.)

Q. After arriving home, and after the experience you have testified to, did you observe or find any lacerations or injuries apparent from the skin and the outside of the body?

A. Well, after I got home, Mrs. Daniel got me to bed and sent for Dr. Smith; he came and made a superficial examination, and across my groin were the marks of the front wheel of the automobile, diamond shape marks.

Q. What color were the marks? [34]

A. They were black and blue, I don't know, darker all the time; he sent after some turpentine, and got some hot cloths, and treated me with turpentine.

Q. At the time that you were run over, and previous to that time, what was the general condition of your health, how were you feeling?

A. Oh, it has been poor.

Q. No, before that time?

A. Before that time I was hardy as a rock, had nothing to complain of at all.

Q. Did you ever have any other injuries of a similar character?

A. No; I had my right arm broken once at a mine.

Q. And in what manner did that accident occur; just the general manner, was it a cave?

A. No, a fall of rock from the roof.

Q. Was any other member of your body besides your arm injured in that particular accident?

A. No.

(Testimony of J. B. Daniel.)

Q. Did you ever have any other injuries?

A. No.

Q. After the experience you have testified to, Mr. Daniel, describe fully how you felt?

A. Well, it is a difficult thing to describe. The shock left me unnerved, and I had pain in my back, and especially in my right hip. Of course this injury here was painful, but I had, where the right wheel ran over my leg here, a lump began to grow there, and became almost as large as a hen's egg.

Q. Did that pain you?

A. And that was very painful, and it is still painful where that lump was formed.

Q. Proceed.

A. I was becoming stiff, and becoming sorer all the time.

Q. Did you say sorer?

A. Yes, becoming more sore constantly; as the effects of the shock left me the nerves began to act, you know, and the pain became more severe.

Q. That is, as the days went on you noticed the pain more?

A. Yes, the condition, that condition is growing.

Q. You speak of condition, you mean the pain is growing?

A. The pain is growing; the pain is more constant than it has been it seems to be developing. My old back for instance, at the present time, is sore, many places just as sore as a boil; and my

(Testimony of J. B. Daniel.)

thigh, the [35] hip is in constant pain, I can't lie on it scarcely.

Q. Have you noticed any pains in any other part of your body?

A. Well, occasionally. This pain runs down through here (indicating,) and settles in my knee, and it has on several occasions gone down to the ankle.

Q. Did you suffer from pains in the upper regions of your body?

A. My back and neck; my neck is very sore constantly; my neck now feels as though there was a heavy ring settled on here, and these pains run up on the side here, and over this way to the forehead; I have forehead pain almost constantly.

Q. You say almost constantly?

A. Almost constantly.

Q. How constant have the pains in your back been? A. How constant?

Q. Yes.

A. There is several places where it is almost constant. It is constant right in the lower part of the back, from this point here (indicating); my back feels as though I was holding a twenty-five pound weight there; sometimes it goes over, and sometimes it comes back; that is the impression I have.

Q. Did you observe any change in your legs or arms, or shoulders, after the accident?

A. Why, my right shoulder had pains in it, in the front here and in the back part.

(Testimony of J. B. Daniel.)

Q. How constant have those pains been?

A. Well, on the right shoulder they are not as constant as they are on the back, but they are constant enough, and give me annoyance almost all the time.

Q. State whether the physical condition of either shoulder has changed?

A. The shoulder is down about an inch from its natural position.

Q. What if any unusual sensation do you experience in the motion of your head?

A. Of my head?

Q. Yes.

A. Well, I can't move it very far, and when I do move it, it grinds.

Q. Where does it grind?

A. It grinds right back here in these muscles (showing).

Q. Move your head from right to left as far as you can.

(Witness does as directed.) [36]

Q. Since this occurrence, Mr. Daniel, have you noticed or observed any difficulty in walking?

A. Yes, I have trouble in walking.

Q. Describe the trouble.

A. Well, I can only describe it in this way, the brain sends a message—

Q. I don't want that kind of a scientific description.

A. My step is uncertain. For instance, I put my foot down to a certain point, a certain position,

(Testimony of J. B. Daniel.)

it sometimes goes to the right or left; now I get started, I can mechanically walk pretty straight, but occasionally even then one foot or the other gives out; it goes from the position I want to go, and I frequently fall, unless I catch myself by something.

Q. Have you experienced any different feeling in your feet since the accident, any different sensation or feeling in your feet when you walk?

A. Yes, my feet feel heavy, feel as though the soles of my shoes are lead.

Q. How constantly? A. That is constant.

Q. Before the accident, Mr. Daniel, how did you sleep? A. I slept fine.

Q. Was there any change after the accident?

A. Yes, I can get an average of five hours of sleep a night.

Q. What did you use to sleep?

A. Oh, I would sleep eight hours; I was always a good sleeper.

Q. What interrupts your rest? A. Pains.

Q. Mr. Daniel, have you the trousers which you wore at the time of the accident?

A. Yes, they are in that package.

Q. I will open this package, and exhibit to you this pair of tan trousers; examine them, Mr. Daniel, and state if those are the trousers which you had on? A. Those are the trousers.

Q. Can you testify whether or not the tear in them existed immediately before accident?

A. No.

(Testimony of J. B. Daniel.)

Q. Did the tear exist immediately after the accident? A. After the accident.

Mr. GOODMAN.—If the Court please, we offer these trousers in evidence. Any objection? [37]

Mr. KEARNEY.—No objection.

The COURT.—If there is no objection they will be admitted.

(The trousers are marked Plaintiff's Exhibit No. 1.)

Mr. G O O D M A N.—(Q.) Mr. Daniel, again directing your attention to this map, I will ask you if you will trace out on this map the course which the automobile took during the time that you observed it?

(Witness goes to the plat on the board, and traces the course.)

Q. Not only the general direction, but did it keep a general straight course? A. No.

Q. How, did it curve?

A. It started to come this way, when I was about there (indicates).

Mr. SPRINGMEYER.—Mark that point with an "A," where you were when you first saw it.

(Witness marks point "A" on the plat.)

WITNESS.—Coming this way, and going in that direction.

Mr. SPRINGMEYER.—Would you mark that with a "B" where the car first was when you first saw it.

(Witness marks point "B" on the plat.)

(Testimony of J. B. Daniel.)

WITNESS.—This is only 63 feet wide here, and it was about 135 feet when I saw it in this direction, about here; about here when I first saw it (indicates).

Mr. GOODMAN.—(Q.) And afterwards you say the automobile stood over here? A. Yes.

Q. Previous to the time you have testified about, that is, July, 1919, that year were you actively engaged in the business of ranching? A. No, sir.

Q. What duties did you perform?

A. I looked after the general ranching, planting and going over the ranch, and seeing that the work was done properly, indicating the work that was to be done, taking supplies from the city of Lovelock down to the ranch, usually twice a day, bringing men up, taking men down, sometimes three times a day.

Q. And you drove back and forth sometimes three times a day? A. Yes.

Q. How far is it from the city of Lovelock? [38]

A. The round trip is about twenty-five miles.

Q. After this injury, Mr. Daniel, did you continue to perform your duties? A. No.

Q. Have you tried to perform some of them?

A. Yes.

Q. With what result?

A. Well, I would make a trip down to the ranch and back, and I would have to lie up for practically the balance of the day, felt fatigued; I never knew what fatigue was until after I had this accident.

(Testimony of J. B. Daniel.)

Q. And you are easily fatigued after this accident? A. Easily fatigued.

Q. Do you experience any difference in your capacity for lifting?

A. Yes, I don't lift anything ever, I haven't lifted anything heavier than a scuttle of coal since I was injured.

Q. What business have you been following since this accident?

A. Nothing. This season I leased some of my land out; leased it out for others to farm; I could not do it, I could not look after it.

Q. So you have not followed the occupation of farming since the accident? A. No.

Q. Have you followed the occupation of mining engineer? A. No.

Q. Was there any reason why you should not follow that occupation?

A. I could not stand the work.

Q. You could not stand the work?

A. I could not stand the work; I could not do the walking necessary to inspect a mine, looking after properties, and so on.

Q. How much walking do you do?

A. Oh, I don't do over a half a mile a day, at an average.

Q. Does that walking have any effect upon your system? A. Yes.

Q. What effect?

A. It makes me fatigued and tired, tired in the legs especially.

(Testimony of J. B. Daniel.)

Q. Have you had any other illness since the accident, any ill feelings since the accident?

A. Well, I have a feeling of faintness sometimes, and those spells are becoming more frequent; it seems my legs won't hold me up, my knees give out, and I feel as though all of my vitality is giving out; I have never become senseless, but I am in such condition I can't do anything. [39]

Q. What do you have to do on those occasions?

A. Well, we found out when I feel them coming on if I lie down and take a drink of strong coffee, either hot or cold, it checks them.

Q. How frequently have you had those spells?

A. I have had them once a week latterly.

Q. That is, recently you have had them once a week? A. Yes.

Q. Did you ever have spells of that kind before this accident? A. Never.

Q. Did you ever have any serious illness during your life? A. Yes.

Q. What year?

A. In 1898 I had what the doctors thought was inflammation of the bowels.

Q. Were you operated on? A. I was not.

Q. Did you recover from that?

A. I recovered fully.

Q. That was in 1898? A. And about 1884—

Q. Well, since 1898, I will ask you have you had any illness?

A. Up to the time I was injured I have not been in bed for a day from illness.

(Testimony of J. B. Daniel.)

Q. From 1898. Mr. Daniel, after this accident did any other doctors besides Dr. Smith treat you?

A. Dr. Crawford, an osteopath down at Antioch, California, treated me for a month for this hip, and my neck.

Q. That is Dr. W. H. Crawford?

A. Dr. W. H. Crawford.

Q. Did any other doctor make any examination, or treat you?

A. Dr. Walker of Reno, M. D. Walker, I think are his initials; you know who I mean.

Q. And did you take any other medicines, or do anything else to aid your condition, any other kind of treatment besides medical treatment?

A. Only this osteopathic treatment. I had some ex-rays made by Dr. Walker.

Q. Did you find it necessary to go to any health resorts?

A. I went to Lake Tahoe; I could not sleep, I lost my appetite; I lost thirteen pounds in weight up till the 25th of August, and I was advised to go to Lake Tahoe, as it was quiet up there, the altitude was higher, and I might be able to get some rest; I went there, took [40] Mrs. Daniel and little niece, and the first afternoon I was there I slept all afternoon, and had dinner, and slept all that night very comfortably without waking up; we remained there four or five days, and I had very excellent results so far as sleeping was concerned.

Q. Have you kept any record of the amount of

(Testimony of J. B. Daniel.)

money you have spent for medical treatment?

A. Well, I have spent about \$450.

Q. Mr. Daniel, have you since the accident observed any change in your condition relative to ability to retain urine?

A. Yes; I have had a great deal of trouble, especially in the day time.

Q. And that is an inability to retain it?

A. Inability to retain it, not so badly at night because I am quiet at night, more or less.

Q. When you move around?

A. Oh, when I move around I urinate frequently.

Q. Did you have that trouble before the accident?

A. No, I didn't have it.

Q. Did you ever have any such trouble at any time during your life before? A. No, sir.

Q. Mr. Daniel, how long did you say you had lived in Lovelock?

A. Have I lived in Lovelock?

Q. Yes? A. Since 1916, the summer of 1916.

Q. Can you state how large a town Lovelock is, the population?

A. Oh, I should say about thirteen hundred people.

Q. Did you make any photographs, Mr. Daniel, of this portion of Fourth and Main Street?

A. I did.

Q. I show you two photographs, and ask you whether or not you can say those are the ones which you made? (Hands to witness.)

(Testimony of J. B. Daniel.)

A. Yes, I made those.

(The photographs are shown to counsel for defendant.)

Q. When did you take these photographs, Mr. Daniel?

A. Well, within ten days.

Q. Within the last ten days? A. Yes.

Q. Can you state whether or not the street itself, the sidewalks, the buildings and the structures are in the same condition now as they were in July, 1919? A. They are the same thing. [41]

Q. The steps represented upon this plat along the street on both sides? A. Yes.

Q. Can you state whether or not those steps are in the same condition they were?

A. Same condition exactly; they are made of concrete, and they have not been removed for some years.

Mr. GOODMAN.—I desire to offer in evidence the two photographs.

Mr. KEARNEY.—No objection.

The COURT.—They will be admitted.

(The photographs are marked Plaintiff's Exhibits No. 2 and No. 3.)

Mr. GOODMAN.—(Q.) Mr. Daniel, do you know whether or not the people in Lovelock make regular and common use of those steps in crossing?

A. They do, invariably.

Mr. GOODMAN.—I think that is all.

(Testimony of J. B. Daniel.)

Cross-examination.

Mr. KEARNEY.—(Q.) How old are you Mr. Daniel? A. How old?

Q. Yes.

A. I will be seventy-three next August.

Q. What is your birthday?

A. August 25th, 1848.

Q. Seventy-three, did I understand you to say?

A. Seventy-three next August, the 25th.

Q. How much do you weigh now?

A. One hundred and fifty-five pounds.

Q. How tall are you, Mr. Daniel?

A. About five feet, five, or five and a half, somewhere along there.

Q. Where did you get your education as a mining engineer? A. In the field.

Q. Whereabouts?

A. About Central America, in Mexico, California, Arizona.

Q. What part of Central America were you in?

A. Part of where?

Q. Central America.

A. In Honduras principally.

Q. Were you in the malaria country down there?

A. No, in the mountains; in fact, Honduras hasn't any malaria; you get malaria in Nicaragua.

Q. How many years were you down there?

A. I spent off and on about seven years. [42]

Q. Continuous?

A. About four years continuously, except trips to return to the States on business.

(Testimony of J. B. Daniel.)

Q. In what capacity were you employed down there in Honduras?

A. As part owner and mill constructor, opening up mines.

Q. Then all your mining experience has been just what you have picked up as a result of connection with mines?

A. No, I had mining education as a boy; I was brought up in a mining camp.

Q. You took no particular course in mining engineering, did you?

A. I took chemistry and assaying at school.

Q. Where? A. Pennsylvania.

Q. What school? A. Philadelphia.

Q. What is the name of the school?

A. I took a two-year course in chemistry at the Philadelphia College of Pharmacy.

Q. What year was that; what two years were they?

A. You mean the years?

Q. Yes. A. Seventy and seventy-one.

Q. Are you hard of hearing, Mr. Daniel?

A. Since I have had this accident, yes, I am hard of hearing; some times it is worse than others; sometimes my hearing is acute, other times it is dull.

Q. Just since the accident? A. Yes.

Q. How about your eyesight? A. My what?

Q. Eyesight. A. It is fine; my eyes are normal.

Q. Was your eyesight good at that time?

A. About the same as they are now.

(Testimony of J. B. Daniel.)

Q. Which ear did you say you don't hear so well in? A. I don't hear so well.

Q. Which ear? A. Both ears.

Q. Both ears? A. Yes.

Q. And you were never troubled with that prior to the time of the accident?

A. With the exception of the left one, but that is worse since I have had the accident. A man picked up a rifle one day ten or fifteen years ago, to shoot at a mark, and he had the muzzle of the [43] rifle near that ear, and I think that affected that ear; but the other ear, the right ear, was good right along.

Q. You said you never had had any sickness during your life?

A. No, I said I hadn't had any sickness for twenty years, since 1898.

Q. Did you have any difficulty or any trouble at all, constitutionally or otherwise?

A. No; I wasn't permitted to complete my sentence. About 1880 I had an attack of pneumonia.

Q. How long were you sick in 1898?

A. Oh, about ten days.

Q. And where was that sickness; where were you living during that sickness?

A. Webb City, Missouri.

Q. I understood that was some bowel trouble of some kind, inflammation of the bowels, I think you said? A. Why, they thought it was.

Q. That is what they call appendicitis now, isn't it?

(Testimony of J. B. Daniel.)

A. Well, it wasn't appendicitis; there was no operation; I don't know what it was; I know it was a bad pain for a while.

Q. Outside of that you have never had any treatment?

A. No. No, I have been a very healthy man all my life.

Q. Never been treated by a physician or anybody since that time? A. No.

Q. Did you know a man by the name of Dr. Crawford? A. Yes.

Q. What were you having him examine you for in 1915?

A. Well, I suppose it was a fad in the first place to have an osteopath treat you for general treatment, loosening up the bones and loosening up the muscles, and so on, without any regard as to any definite illness; and I have had, to tell the truth I have had an examination of my physical condition every year for a great number of years.

Q. Why didn't you say so then, that you had these doctors examine you from 1915 on, on the direct examination?

A. Because it wasn't for any disease; it wasn't for any illness.

Q. If you are a perfectly healthy man is it a usual thing to go to a doctor and have him go through you, and see if he can find something wrong with you? ?

A. I wanted to find out if I was normal, to keep in good shape, to [44] keep normal.

(Testimony of J. B. Daniel.)

Q. If you found you were in good shape what did you go back again for? A. In about a year.

Q. What did you go back the second time for?

A. To see that I was all right.

Q. You went back every year, didn't you?

A. Yes, I have been doing that for a number of years, have my heart tested, lungs tested, and urine tested.

Q. You went back in 1915, 1916, 1917 and 1918, didn't you? A. Yes.

Q. Then you were there in February, 1919, weren't you, six months before this accident was supposed to have occurred? A. Yes.

Q. How long was it after the accident occurred that you saw this man? A. How long after?

Q. Yes.

A. I think that Dr. Crawford examined me in January or February.

Q. What year?

A. 1919; that is my impression.

Q. And when did he next examine you?

A. He next examined me in the spring of 1920, I guess.

Q. Well, to be exact, it was on the 30th day of April, 1920, almost a year after this accident, was it not? A. Possibly.

Q. You didn't go to him between the 28th day of July and the 30th day of April, 1920, did you?

A. No; that examination was made for the purpose of diagnosing my troubles.

(Testimony of J. B. Daniel.)

Q. That was almost a year after this accident occurred? A. I suppose so.

Q. Now the day that this accident occurred, you got up yourself, and walked into the postoffice, did you not?

A. I did not—oh, after the accident, yes, I walked into the postoffice.

Q. And the boy, the young man who was driving the car, went in and put his hand on your shoulder, and talked to you, did he not?

A. He asked me if he should take me home.

Q. What did you say to him?

A. I said no. [45]

Q. Is that all you said?

A. I don't know what else I said; I know I objected to being taken home in the automobile, because Mrs. Daniel was very nervous, and I felt there might be trouble at home if I were taken home as an injured man.

Q. And the boy went in and asked if you were hurt, and asked if he could not take you home in his automobile, didn't he?

A. I don't know whether he asked if I was hurt; he asked if he should take me home in his automobile.

Q. And isn't it a fact you cussed at him and swore at him?

A. Oh, no, I never swore at him; I never swore at anybody, never have sworn.

Q. What did you say to him?

A. I told him no.

(Testimony of J. B. Daniel.)

Q. Did you pull away from him, tell him to get away from you?

A. I don't know anything about that; I could not pull away from him because he didn't have hold of me.

Q. Didn't he lay his hand on your shoulder?

A. He may have done that.

Q. And he courteously asked you if he could take you home?

A. He may have done that; he asked me if he could take me home, and I said no.

Q. Then you walked home yourself? A. Yes.

Q. How long was it after the accident before you walked home? A. It wasn't long.

Q. Well, how long did you remain in the post-office?

A. Oh, I remained in the postoffice probably five minutes.

Q. To whom did you talk while you were in the postoffice?

A. I didn't talk to anybody except the boy.

Q. What did you do in the postoffice?

A. I went back to the postoffice, I was dazed, went back to the postoffice to get my mail, but I didn't get it; I turned around and came back, and went home.

Q. How long were you home before you called in a physician, if you did call one?

A. Called one at once.

Q. Who did you call?

(Testimony of J. B. Daniel.)

A. Dr. Smith; Mrs Daniel phoned for him at once. [46]

Q. And he came up there, did he?

A. He came up.

Q. How long did he stay there?

A. Oh, he stayed probably fifteen or twenty minutes.

Q. And he examined you, didn't he?

A. He examined me; he examined to see where I was superficially injured.

Q. And what did he tell you then; isn't it a fact that he told you there was nothing seriously the matter with you?

A. No, he didn't tell me; he didn't say there wasn't anything serious the matter with me.

Q. He didn't go back again?

A. Yes, he came back the next day.

Q. What time the next day?

A. I can't tell you that.

Q. Was it in the forenoon or the afternoon that he went back?

A. It must have been in the forenoon.

Q. What did he tell you then; didn't he tell you there was nothing serious the matter with you?

A. No, he didn't tell me there was nothing serious the matter with me.

Q. He didn't come back the third time?

A. Yes, he did come back the third time, and put a plaster on me.

Q. When did he come back the third time?

(Testimony of J. B. Daniel.)

A. A few days after that.

Q. How many days? A. I could not tell you.

Q. Were you in bed when he came back the next time? A. No, I was not.

Q. Well, how many days after?

A. Probably a week; I won't say so, I won't say positively, because I don't know exactly what the time was, but he put a surgeon's plaster on me.

Q. Where did he put that plaster on you?

A. On my back, three thicknesses of surgeon's plaster, three inches wide.

Q. Tell me how long after the accident he did that?

A. I can't tell you; a week probably, a week or ten days, whatever it might be, probably.

Q. You were out the next afternoon, were you not?

A. The next afternoon I was out in the yard.

Q. You were out watering the yard the next afternoon?

A. No, I was not out watering the yard the next afternoon. [47]

Q. Where were you?

A. I was walking out in the yard, up and down the path.

Q. Dr. Smith didn't see you any more after that third time, did he? A. Yes.

Q. Tell me when?

A. He tried to take some X-rays for a long time, and his machine wasn't strong enough to be ef-

(Testimony of J. B. Daniel.)

fective; then he said, "I am going to Reno and I will see what I can find in Reno;" he came and told me that some drugstore in Reno would find out who had an X-ray machine, and if I came down I should go to him, and he would let me know; so I went down to Reno, and went to this drugstore, and they told me Dr. Walker had an X-ray machine.

Q. What date was that when you went to Reno to have this X-ray taken? A. That was October.

Q. That was from July to October before you went down there? A. Yes.

Q. October of what year? A. 1919.

Q. Now, in October, 1919, what time in October?

A. I don't know; probably the middle of October.

Q. About the 15th, is that as near as your recollection fixes it now?

A. I have a memorandum book; I can tell exactly when it was, if it is necessary.

Q. You had already been to Lake Tahoe, had you not, and drove your car up with your family, before you had these X-rays taken? A. Yes.

Q. When did you go to Lake Tahoe?

A. On the 25th of August.

Q. What year? A. 1919.

Q. Drove your own car, did you not? A. Yes.

Q. Where did you stop at the Lake?

A. I stopped at Glenwood.

Q. Glenwood or Glenbrook? A. Glenbrook.

Q. You drove your car clear to Glenbrook?

A. No, I took two days to it.

(Testimony of J. B. Daniel.)

Q. You drove the entire distance? A. Yes.

Q. Did you go to California at that time?

A. No.

Q. How long did you stay at Glenbrook?

A. Four or five days. [48]

Q. Where did you go then?

A. Came back to Reno.

Q. Did you stay in Reno.

A. Stayed in Reno about four days.

Q. You drove your own car back? A. Yes.

Q. Did you see any physician in Reno at that time?

A. I saw Dr. Gilsby about my neck; my neck was very sore.

Q. Did you see anybody else? A. No.

Q. You didn't see Dr. Walker that time?

A. No, didn't see him that time, didn't know him that time.

Q. Dr Smith was the only physician who examined you then in July or August? A. Yes.

Q. And during the first week that you were injured he saw you twice, once the first day and once two or three days after? A. Yes.

Q. And then a week or ten days after, after you had been out, he put a plaster on your back?

A. Yes.

The COURT.—(Q.) When did Dr. Smith see you the second time?

A. It was the next day after the injury.

Mr. KEARNEY.—(Q.) Now do you remember

(Testimony of J. B. Daniel.)

what day of the week the 28th of July was?

A. No, I do not.

Q. Do you remember where you went the following Sunday? A. I don't remember that.

Q. Did you ever go on a picnic with a crowd of children in your automobile?

A. No, I never took a crowd of children in my automobile to a picnic.

Q. Or anybody else's automobile; did you ever have a crowd of children with you going on a picnic?

A. No, I never had a crowd of children with me going on a picnic.

Q. Well, did you have one or more children with you going on a picnic on any Sunday three or four days after the accident was supposed to have occurred?

A. No, not three or four days after the accident.

Q. How long after, if at all, did you take such a trip?

A. I don't know; there was a picnic the 4th of July, but I don't know whether I attended that picnic or not.

Q. Will you say you didn't take some one to the picnic, or accompany them? Will you say you did not accompany any one to a picnic a few days after the accident? A. I don't remember it.
[49]

Q. Well, you were out driving your car a few days after the accident, were you not?

(Testimony of J. B. Daniel.)

A. Oh, no; I was not; it cannot be possible.

Q. Well, were you around town within a few days after the accident?

A. No, I was not out of town.

Q. Around the town, I say, around the town.

A. I might have been in town.

Q. You walked down town within two or three days? A. Yes, I went to the postoffice.

Q. Did you go to a moving-picture show three days after the accident? A. I can't tell you that.

Q. Wasn't it just a few days after the accident?

A. I can't tell you; I don't know.

Q. Were you at a moving-picture show at Lovelock within five days after the accident?

A. I can't tell you that.

Q. Well, will you say yes or no?

A. I can't tell you, I don't know; I cannot recall, that is pretty near two years ago, I cannot recall that.

Q. Do you recall having visited a moving-picture show in company with Mrs. Daniel and Mrs. Flick and Mrs. Beale?

A. No. I have heard of that story.

Q. Well, will you state you didn't accompany those people to a moving-picture show?

A. No, I didn't accompany those people to a moving-picture show.

Q. You didn't?

A. I and Mrs. Daniel may have gone to the moving-picture show, but we didn't accompany Mrs. Flick or Mrs. Beale.

(Testimony of J. B. Daniel.)

Q. Did you sit beside Mrs. Flick or Mrs. Beale when you went to the moving-picture show?

A. I don't know; I don't know Mrs. Beale; I never knew Mrs. Beale.

Q. Did you sit beside Mrs. Flick, another lady, at this time you went to a moving-picture show within five days after the accident?

A. I don't know, I don't think so.

Q. Did you ever meet Mrs. Beale?

A. I never met Mrs. Beale.

Q. Will you state you were never introduced to Mrs. Beale?

A. I will state I was never introduced to Mrs. Beale to my knowledge. [50]

Q. Were you ever introduced to Mrs. Flick at a moving-picture show?

A. I have known Mrs. Flick for a good many years, it was not necessary for an introduction.

Q. Will you state you were not introduced to Mrs. Beale at a moving-picture show within five days after the accident?

A. No; I never met Mrs. Beale; I know who Mrs. Beale is from Mrs. Daniel's and Mrs. Flick's conversation, but I never met her.

Q. Did you have any conversation at that time with Mrs. Flick? A. No.

Q. Did you say anything to her about your health at that time? A. No.

Mr. RICHARDS.—One moment! Well, it is answered.

(Testimony of J. B. Daniel.)

Mr. KEARNEY.—(Q) Were you discussing this accident in any way at that time?

Mr. RICHARDS.—May it please the Court, I desire to enter a formal objection to the evidence sought to be elicited by the question propounded, and similar questions, on the ground it is incompetent, irrelevant and immaterial, and is not proper cross-examination.

The COURT.—Well, I presume you contemplate laying a foundation to contradict the witness?

Mr. KEARNEY.—Yes, your Honor.

The COURT.—Will it not be necessary for you to refresh his memory by calling his attention to the people who were present and to the exact words that he used, as far as you can remember them?

Mr. KEARNEY.—I think that is correct. I want to lay the foundation as to the presence of the parties first.

Mr. RICHARDS.—If that is the purpose, we add to the objection the ground that the question is not sufficient in time, place, or circumstances to lay a foundation to impeach the witness.

Mr. KEARNEY.—(Q.) Do you remember the date that you went to Lake Tahoe, Mr. Daniel?

A. The 25th of August.

Q. August 25th, 1919? A. 1919.

Q. A few days, or a short time prior to August 25th, 1919, did Mrs. Flick introduce you to Mrs. Beale at a moving-picture show in Lovelock, and at that time did you state to Mrs. Flick and Mrs. Beale that [51] you were going to Lake Tahoe

(Testimony of J. B. Daniel.)

on an automobile trip in a short time, and that you were feeling all right?

Mr. RICHARDS.—We object to the question, and to the evidence sought to be elicited thereby, on the ground it is incompetent, irrelevant and immaterial; that it is not proper cross-examination, and that it does not tend to prove or disprove any issue in this case; and that it is remote from the injury alleged.

Mr. KEARNEY.—We desire to submit the matter on the ground it is competent for the purpose of impeaching the testimony of the witness. That is the purpose of the offer.

Mr. GOODMAN.—We add the objection that impeachment must be upon a material point; and regardless of how the witness might answer that, the point is not material enough to warrant the introduction of the evidence.

The COURT.—Well, would you regard testimony offered here now by the defendant to show that plaintiff was feeling first rate within a few days after this accident, as immaterial? I am inclined to think that would be material. He has testified as to his condition ever since the accident, and this is part of statements that were made by him as to his condition within four or five days after the accident. I think that is relevant. You may answer the question.

Mr. RICHARDS.—Plaintiff excepts to the ruling of the Court.

WITNESS.—Shall I answer the question?

(Testimony of J. B. Daniel.)

The COURT.—Yes.

WITNESS.—Will you put that question again, please?

(The reporter reads the question.)

A. I will say unequivocally no.

Mr. KEARNEY.—(Q.) What is your answer to the question as to whether or not Mrs. Flick introduced you to Mrs. Beale on that occasion?

A. No, I was never introduced to Mrs.—will you give me the first name of Mrs. Beale?

Q. I don't know it, I am sure. It is Mrs. R. H. Beale is all I know.

A. I was not introduced—Mrs. Chester Beale you have reference to?

Q. Mrs. R. H. Beale is all I have; she is a niece of Mrs. Flick. [52]

A. No, I was not introduced.

Q. During the period between July 28, 1919 and August 25, 1919, were you able to be out of the house and around town? A. Yes.

Q. Were you at moving-picture shows in the evening at any time during that period?

A. I presume so.

Q. Were you driving your automobile back and forth to your ranch? A. No.

Q. At any time? A. No.

Q. Prior to the time you went to Lake Tahoe?

A. No.

Q. When is the first time you drove your automobile after July 28th, 1919?

(Testimony of J. B. Daniel.)

A. I think it was when we prepared to go to Lake Tahoe.

Q. Were you out with any one else in an automobile between those dates?

A. I don't remember.

Q. You didn't see Dr. Walker until after you came back from Lake Tahoe, and had gone on to Lovelock?

A. No, I saw Dr. Walker, my impression now is, the 20th of October for the first time.

Q. The 20th of October. Did he take X-ray pictures of you? A. Yes.

Q. He made an examination of you did he not?

A. Yes.

Q. And he also made a report to you at that time, did he not, on your physical condition?

A. He made a report—

Q. (Intg.) Just answer yes or no.

A. He made a report on one—

The COURT.—Wait a minute.

Mr. KEARNEY.—Just answer that yes or no.

The COURT.—Read the question. I think you can answer it yes or no.

(The reporter reads the question.)

WITNESS.—You must qualify the report; he didn't make a report on the physical condition.

The COURT.—You can answer the question yes or no, and then you can explain later.

Mr. KEARNEY.—(Q.) He did not? A. No.

Q. Did he make any report to you at that time?

(Testimony of J. B. Daniel.)

A. He did; he made a statement with regard to one of the X-ray pictures that he made. [53]

Q. Just a moment now. Isn't it a fact that he reported after taking an X-ray picture of you that he could find nothing wrong with you? A. No.

Q. What was the report?

Mr. RICHARDS.—I object as not proper cross-examination; incompetent, irrelevant and immaterial. We offered nothing on this in chief.

Mr. SPRINGMEYER.—You said he was examined by Dr. Walker; we certainly have a right to find out what Dr. Walker said to him.

Mr. RICHARDS.—I didn't recollect that he said he was examined by Dr. Walker. I withdraw the objection.

Mr. KEARNEY.—I withdraw the question.

Q. It is a fact you didn't go back to Dr. Walker for any further treatment, isn't it?

A. Yes, I went back to him.

Q. When? A. The following March, I think.

Q. What time?

A. Well, I cannot give you the—May 5th and 6th probably.

Q. What year? A. 1920.

Q. Then from October, 1919, to May, 1920, you had no medical treatment? A. No.

Q. And you had an X-ray taken by Dr. Walker in October, 1919? A. Yes.

Q. On March 30th, 1920, you visited your old-time friend in Antioch, the osteopath, Dr. Crawford?

(Testimony of J. B. Daniel.)

A. No, I saw Dr. Walker about that time; I think it was in March, 1920, that I saw Dr. Walker and had additional pictures taken, and he gave me the following advice, if it is admissible.

Q. Well, that is hearsay. When did you see Dr. Walker then? A. Dr. Crawford?

Q. Yes. A. In May.

Q. Will you state that it was not in April, 1920?

A. No, I think about the first of May, I went down there.

Q. Well, the 30th of April, to be exact? Wasn't it the 30th of April?

A. No, I think we came home in June; I was down there a month. [54]

Q. Well, Dr. Walker didn't treat you for anything, did he?

A. No, he said it wasn't worth while; he could not do me any good, nor could any other physician do me any good.

Q. Both Dr. Walker and Dr. Smith are practicing physicians in the State of Nevada, are they not?

A. They are practicing physicians.

Q. They are physicians from the regular medical schools, are they not, practicing regular medicine?

A. I presume so.

Q. Dr. Crawford is an osteopath, and is not practicing now, is he? A. He is practicing.

Q. He was not practicing on April 30th, when you visited him in Antioch, was he?

A. No, he was living on his ranch. I don't know

(Testimony of J. B. Daniel.)

that was April, don't put that down as April; it was May some time.

Q. Dr. Crawford does not belong to one of the regular medical schools, does he; he practices in a different one than the regular physicians practice, doesn't he?

A. He is a graduate of the Kirksville Osteopathic College.

Q. He is not a graduate of any medical school that treats by the application of medicine?

A. I don't know; I never saw the diploma in either case.

Q. Now you said that you were crossing the street from the Mercantile Building to the postoffice on the day of the accident? A. Yes.

Q. What time of day was that?

A. Half past three in the afternoon.

Q. Were the Commissioners in session on that date?

A. The County Commissioners were in session that afternoon.

Q. In what building do the County Commissioners meet?

A. They met in Mr. Pitt's office in the Lovelock Mercantile Company's building.

Q. Upstairs? A. Upstairs.

Q. Now if I understood you correctly, you state that you left the sidewalk in front of the Mercantile Building to cross the street? A. Yes.

Q. Now did I understand you correctly, when you

(Testimony of J. B. Daniel.)

were about half [55] way across the street you saw the auto?

A. I said I saw two autos parked on the south side in the lower end of the block, and one auto parked on the north side of the street down near the end of the block, otherwise there wasn't an auto in sight.

Q. You said when you had proceeded to a point about half way across the street, you saw this auto coming? A. Yes.

Q. How far away was it when you first saw it coming?

A. From a hundred and twenty-five to a hundred and fifty feet.

Q. Was that the auto you saw parked on the south end of the street on the north side?

A. I don't know.

Q. Did that single auto parked on the north end of the street remain there when this other was coming down the street?

A. I don't know; I don't know where the auto came from; I thought it came from across the railroad.

Q. You say you thought it came from the railroad?

A. No, I didn't say I saw it come from across the railroad, but there wasn't any auto on the street moving, and in a couple of seconds this auto was coming up the street.

Q. Which way was it proceeding?

(Testimony of J. B. Daniel.)

A. Going toward the west, toward where I was walking.

Q. Where was this auto parked on the north side of the street, in front of what building?

A. I don't know; I cannot give you any idea; it was down the lower end of the street.

Q. What do you mean by down the lower end of the street?

A. Down toward Lovelock, down toward the railroad.

Q. Was it down toward the bank somewhere?

A. Well, down the lower part of the street; I can't tell you where it was parked, I just noticed down the lower end of the street.

Q. It was south of the point where you encountered the automobile finally? A. It was east.

Q. How does that Fourth Street run, east and west or north and south?

A. Well, practically east and west.

Q. Then the depot is east of the point where you were struck?

A. East of where the autos were parked. [56]

Q. Where were the other two autos parked?

A. They were on the south side of the street, down near the end of the street.

Q. Near what building, if you remember?

A. They must have been in front of the Big Meadow Hotel, because that takes up half the block.

Q. Can you describe that with more particularity, where that auto was on the other side of the street, the one that was parked?

(Testimony of J. B. Daniel.)

A. No, I can't. I simply saw it was idle down there, parked up against the curb.

Q. What kind of a car was it?

A. The one that struck me was a Ford.

Q. I mean the one that was parked.

A. Too far away for me to notice.

Q. You could not see that far away?

A. It wasn't too far away, but I didn't look for the design of the car, the style of the car.

(A short recess is taken at this time.)

Q. Did you see anything else on the streets of Lovelock that afternoon, besides the three automobiles?

A. I saw some people on the sidewalk.

Q. Well, were there any obstructions of any kind on the street? A. No obstruction whatever.

Q. The street was perfectly clear?

A. Perfectly clear east and west.

Q. You didn't see any lumber, or anything around the streets or sidewalks? A. No.

Q. You didn't see any sand or gravel anywhere?

A. No, no sand or gravel that I noticed.

Q. And you can't state how far from the south end of that block this car was parked on the north side of the street?

A. No, I don't know how far it was to the end of the block; I simply glanced at it and saw it standing there.

Q. Did you notice whether that car remained there as you proceeded out in the street?

A. Yes, it remained there, apparently it remained

(Testimony of J. B. Daniel.)

there; it was there when I stepped into the street, and started walking across the street. [57]

Q. Did that car move then? A. I don't know.

Q. You don't know whether the car moved from its position or not?

A. The car that struck me was moving all right.

Q. I am speaking now of the lone car that was parked on the north side of the street when you stepped off into the street?

A. I don't know.

Q. You didn't pay any attention to that car?

A. I saw it when I stepped into the street; it may be the car that struck me, I don't know.

Q. How many times did you look down that way after you stepped off the sidewalk?

A. I looked several times, or I would not have seen the car coming toward me.

Q. Now the car was a hundred and twenty-five feet away when you first saw it?

A. Approximately, when I first saw it.

Q. When you looked the second time how far was it? A. It was pretty close.

Q. How far?

A. If it was coming twenty miles an hour, it was coming at the rate of thirty feet a second, and it doesn't take long for two or three seconds to go by.

Mr. KEARNEY.—I move the answer be stricken as not responsive.

The COURT.—The answer was not responsive. It may go out.

(The reporter reads the question.)

(Testimony of J. B. Daniel.)

Mr. KEARNEY.—(Q.) How far away from you?

A. Why, I don't know, probably fifty feet.

Q. When you looked the third time how far away was it?

A. I kept my eye on it all the time from then, because it was coming so fast—trying to get out of the road of it.

Q. From the time it was fifty feet away you kept your eye on it constantly? A. Yes.

Q. What did you do when the car got up close to you, move or stand still?

A. Moved as fast as I could.

Q. In what direction did you move?

A. Toward the pavement, close to the pavement.

Q. How far from the pavement were you?

A. Oh, I don't know, probably eighteen feet, I can't tell exactly. [58]

Q. Did you run; did you quicken your steps?

A. Yes, I ran.

Q. When you saw this car fifty feet away from you, were you in a direct line with it then, in a direct line with its travel?

A. The car was coming right toward me, as though the driver had an object in striking me, as I was going across the street the car kept still coming toward me, and struck me when I was about fourteen feet from the curb.

Q. You say the car made a turn in toward the curb, did it?

A. Oh, yes, towards myself directly.

(Testimony of J. B. Daniel.)

Q. Did you attempt to stop then and let the car pass in front of you?

A. It was so close to me by that time that either going back or going front was the same thing; I could not have gone back.

Q. Which did you do, did you step back or forward? A. No, I stepped forward.

Q. Did you touch the car with your hands in any way?

A. No, I found that the car was going to strike me right in the center under the radiator, and I threw myself over that way.

Q. Which way?

A. Over towards the mud-guard.

Q. Which mud-guard?

A. The right-hand side, thought I would not fall directly under the car.

Q. Now you had the right hand fender, did you; you mean by the mud-guard the fender, I presume?

A. The fender—mud-guard.

Q. Did you take hold of the right-hand fender?

A. My arms threw out that way, that is all I know.

Q. Isn't it a fact that you grabbed hold of the right-hand fender after passing clear in front of the car?

A. No, I did not; no, I didn't pass clear in front of the car; the car was making a direct drive right for me, for the center of the car, and coming awful fast that last forty or fifty feet.

(Testimony of J. B. Daniel.)

Q. You had your hand on the right-hand fender of the car? A. I suppose so.

Q. And you also had your hand on the right-hand lamp of the car, did you not? A. How is that?

Q. Your other hand was on the right-hand lamp of the car, was it not? A. I don't know. [59]

Q. You don't know? A. No.

Q. Now that was on the side of the car closest to the postoffice? A. Yes.

Q. And you don't know whether you were eighteen feet or twenty feet from the curb at that time?

A. No, I was fourteen feet from the curb at that time, about.

Q. About fourteen feet from the curb. Now did you try to get out of the way of the car at all?

A. Sure I did.

Q. You saw it coming constantly, you had your eye on it from the time it was fifty feet away?

A. Approximately.

Q. Well, what did you do to try and get out of the way of the car during that time, when it was fifty feet from you; state what you did to try and get out of the way of that car? A. I ran.

Q. Oh, you did run? A. I ran, yes.

Q. Oh, I thought you said you didn't run.

A. I wasn't standing still, I was running.

Q. Which way did you run?

A. I ran toward the curb, because there was more space on the outside, on the south side, than there was on the north side for a man to pass.

(Testimony of J. B. Daniel.)

Q. Why did you say a moment ago you didn't run?

A. I didn't say I didn't run that I remember, if I did it was a mistake.

Q. Which is correct then; did you run or did you not run? A. I ran.

Q. Now about how far was the car away from you when you started to run?

A. It was pretty close.

Q. Well, about how many feet?

A. Probably ten feet.

Q. Now as I understand you, you were in a direct line with the car from the time you first saw it?

A. No, the car was in a direct line with me; the car was coming after me.

Q. You were in a direct line, that is, your eyesight was looking toward the front end of the car?

A. Yes.

Q. Now do I understand you to say that you can tell the speed of a car when it is coming in a direct line, that you can tell whether it [60] is going ten or twenty or thirty miles, when you are in a direct line?

A. You can, no question about that when a man is a judge of distances and speed.

Q. By looking at the car itself can you tell how fast it is going when it is in a direct line?

A. Coming in a direct line, a good judge of distances and speed can tell how fast that car is covering the ground.

(Testimony of J. B. Daniel.)

Q. At that time I suppose you stopped and figured the distance of 125 feet that the car was away from you, then made a quick mental calculation that car was coming twenty or thirty miles an hour?

A. No, I didn't; I didn't say so; I said by the time it got up speed, when it struck me it was running about twenty miles an hour.

Q. How did you make that calculation?

A. By the speed with which it came along.

Q. Did it increase its speed as it came along the street from the time you first saw it at 125 feet distance?

A. I didn't pay much attention to it after I saw it was going on back of me.

Q. You thought that car was going on back of you?

A. Precisely; when I saw that the car turned out, turned out to the left or back of me, coming in that direction, that it was perfectly safe to cross; when I looked at it again, quite a few feet from that position, the car turned around and was coming directly as fast as I could go across the street, it was coming toward me; it just looked to me as though the driver was trying,—was going to try to create a sensation by knocking somebody over.

Q. You thought this young man driving this car was one of those fellows who wanted to commit a murder?

A. No, I didn't say that; I didn't say that.

Q. Now, Mr. Daniel, tell me how you determine

(Testimony of J. B. Daniel.)

the speed of this car when it was in a direct line with your eyesight, and tell me when you made that calculation?

A. Well, the brain acts very rapidly in a crisis, and the speed at which that car was coming, I could see it coming, I was getting out of the road as fast as I could. [61]

Q. Now you have not answered my question.

A. What?

Q. Just tell me when you made this calculation that this car was coming at the rate of twenty miles an hour?

Mr. GOODMAN.—I think the answer is responsive. He also asked how he made the calculation, and the witness is explaining how he made the calculation.

The COURT.—Is that the same question as before? I understood the first question was how he made the calculation, and now you have changed it to when he made the calculation.

Mr. KEARNEY.—I will ask the first question.

Q. How did you make that calculation to figure the speed of the car?

A. Well, it is one of those things by which judgment acts very quickly; you make a judgment from the conditions that you see; you don't have very much time to calculate nor to figure, but the judgment,—the mind acts quickly as to the judgment of the party as to speed and distance, and that was so in my case.

(Testimony of J. B. Daniel.)

Q. That thought came to you right there, that he was going twenty miles an hour? A. Yes.

Q. Did you make that calculation before the car struck you, or after?

A. No, I made it after; the thing was so impressed on my mind, the speed and the getting over the ground was so impressed on my mind.

Mr. RICHARDS.—I didn't get the answer.

WITNESS.—It was so impressed on my mind that thinking of it afterwards, that car was going not less than twenty miles an hour.

Mr. KEARNEY.—(Q.) Was the car going twenty miles an hour when you first saw it?

A. No, I don't think it was; it was gathering speed very rapidly.

Q. When did it attain the speed of twenty miles an hour?

A. Oh, I can't tell you that.

Q. Then you can't tell how fast it was going when you first saw it?

A. No; it wasn't going so rapidly, I know that, but it was getting up speed very rapidly.

Q. You said the front wheel of the auto ran across your leg? A. Pardon me? [62]

Q. You said the front wheel of the auto ran across your leg?

A. No, I said it ran across my abdomen, the lower part of my abdomen, the front wheel.

Q. Which leg did it run across?

A. The left one, right here (showing); the front

(Testimony of J. B. Daniel.)

wheel hit that thigh bone, came right across this way.

Q. Were you lying on your face or your back?

A. No, I was lying on my back, at right angles to the car.

Q. How much did you weigh when you lost that twenty-five pounds you spoke about?

A. When I what?

Q. When you lost that twenty-five pounds weight.

A. I lost between the 28th of July and the 25th of August, thirteen pounds in weight.

Q. Oh, thirteen pounds in weight; what was your weight at that time?

A. One hundred and fifty pounds.

Q. You weighed one hundred and fifty in August? Now you gained weight since then, did you? A. I have gained since then.

Q. You look very healthy now.

A. Yes, I haven't very much to do, and Mrs. Daniel feeds me pretty well.

Q. Did I understand your eyesight wasn't very good? A. How is that?

Q. Did I understand your eyesight wasn't very good? A. No, my eyesight is fine.

Q. Can you read the clock there?

A. Oh, yes, readily.

Q. Your head didn't bother you then when you turned it a little, did it?

A. No, my eyesight is all right.

Q. There wasn't very much ranching going on last year in Lovelock Valley, was there?

(Testimony of J. B. Daniel.)

Mr. RICHARDS.—Object to the question as not proper cross-examination, incompetent, irrelevant and immaterial.

Mr. KEARNEY.—If the Court please, he stated that he didn't take care of his ranch last year in Lovelock Valley, and I think it is very pertinent to show there was no ranching going on; we expect to show the reason *why was*, there wasn't any occasion for any ranching.

The COURT.—I will allow the question if that is the purpose of it. [63]

Mr. KEARNEY.—That is the only purpose of it.

Q. You stated you didn't do any ranching last year in Lovelock Valley? A. Not in 1920.

Q. There wasn't any water?

A. There wasn't any water.

Q. In 1919 the ranching season was over?

A. Yes.

Q. You went to Lake Tahoe on a vacation during the latter part of the season, after the ranching was over? A. Yes.

Q. Last year there wasn't any occasion to plant any grain or anything, the river was absolutely dry, there was no water? A. Yes.

Q. Is not that the reason you didn't engage in ranching last year?

A. Didn't engage in ranching?

Q. Yes. A. Certainly.

Q. You state that you spent \$450 for medical attention? A. Approximately.

(Testimony of J. B. Daniel.)

Q. Detail those amounts and to whom paid; give me the amounts you paid out, and to whom?

A. (Examining book.) 1919, from August 25th, well, Lake Tahoe trip, was \$99.70.

Q. That is for yourself and all the family?

A. How?

Q. That is for yourself and family?

A. That is for myself and wife, yes. October 21st and 22d, to see Dr. Walker, was \$36.25. March 5th and 6th, Reno, to see Dr. Walker, about \$42, in round figures.

Q. Does that include your railroad fare, etc., hotel bills? A. Exactly.

Q. And everything? A. Sure.

Q. Did you drive in your car that time?

A. No, I did not.

Q. How much of that was given to Dr. Walker for taking X-rays? A. Well, I paid him \$20.

Q. I mean on those two dates there, out of that \$42? A. And I paid him \$15.

Q. Is that all?

A. That is all I paid him for his services.

Q. One was in October and the other was in March? A. March 5th and 6th. [64]

Q. That October, \$36.25, the difference represented some expense?

A. Well, when you go to see a doctor you have to pay railroad fare, when he is out of town.

Q. I am speaking now of the amount you actually gave the doctor on those two trips.

(Testimony of J. B. Daniel.)

A. That would be \$35, outside railroad fare and hotels.

Q. What else is there?

A. Dr. Chestnut, eight dollars.

Q. Doctor who is that? A. Chestnut.

Q. Who is he and where does he live?

A. He lived at Lovelock.

Q. What treatment did he give you?

A. Chiropractic, working on my neck.

Q. When was that?

A. That was April, 1920. Dr. Crawford, April 30th, \$10; and trip to Antioch for treatment by Dr. Crawford, \$233.62, including railroad fare and hotel.

Q. Was that all your own personal expense?

A. Sure it was my personal expense.

Q. Who was with you? A. Mrs. Daniel.

Q. Didn't that include her expense?

A. She was nurse.

Q. How long did you stay?

A. I had to take some one with me.

Q. How long did you stay away on that trip?

A. A month.

Q. Where did you stay?

A. Antioch, California.

Q. All of the time? A. Yes.

Q. And you paid the doctor ten dollars?

A. No, I didn't pay him—that was another time I paid him the ten dollars.

Q. How much did you pay him that trip?

A. I don't know; I don't remember what I paid

(Testimony of J. B. Daniel.)

him on that trip; I have this all bunched in one lot, May 20th to June 20th.

Q. What year?

A. Antioch trip and expenses to Dr. Crawford, \$233.62.

Q. Can you tell me how much you gave Dr. Crawford?

A. I don't know; I suppose his charges were \$50.

Q. Don't you know?

A. Not without looking it up in my check-book.

Q. In making this memorandum didn't you take that from actual figures you put down at the time?

A. There is the entry (showing) May 20th to June 20th, Antioch trip [65] expenses and Dr. Crawford, \$233.62.

Q. Didn't you itemize that?

A. It is not itemized.

Q. At the time? A. It is not itemized.

Q. Where did you live while you were down there? A. Where did *he* live?

Q. Where did you live? A. Lived at the hotel.

Q. All the time?

A. All the time, the Bradshaw Hotel.

Q. Mrs. Daniel lived there with you all the time?

A. Yes.

Mr. KEARNEY.—I think that is all.

Redirect Examination.

Mr. GOODMAN.—(Q.) Mr. Daniel, you stated on cross-examination that you didn't ranch last year because there wasn't any water in the Hum-

(Testimony of J. B. Daniel.)

boldt River; was there any additional reason; could you have ranched had there been water?

A. I could have ranched; I would have leased the ranch out if there had been water.

Q. Well, could you have managed the ranch as you had in former years?

A. No, I could not have looked after it myself.

Q. And is there plenty of water in the Humboldt River this year? A. Yes, ample.

Q. How much of the land is leased?

A. There is in the neighborhood of five hundred acres.

Q. How much is idle? A. Twelve hundred.

Q. Did you testify as to what kind of a car struck you, what kind of a model?

A. It was a Ford.

Q. What model, a touring car?

A. A touring car.

Q. The ordinary five-passenger touring car?

A. Yes, a touring car.

Q. How far do you live from the postoffice in Lovelock, Mr. Daniel?

A. About three hundred feet.

Q. The distance would be about a hundred yards?

A. A hundred yards, yes.

Q. And that is the distance you had to walk home from the postoffice? A. Yes.

Q. You said that you walked out in the yard, up and down the pathway in the back yard a few days after the accident; did you have any [66] difficulty in executing that exercise?

(Testimony of J. B. Daniel.)

A. Yes, I had difficulty.

Q. Did you have any reason then for doing it?

A. How?

Q. Why did you do it then?

A. I wanted some out-door air; I am so accustomed to out-door air, and my muscles were sore and stiff, and I just felt this way, if I remain here any longer I will go under, I have got to get out and get some exercise, and get these muscles limbered up.

Q. And it pained you to do the exercise?

A. The pains were due to the condition of the nerves and muscles, the injuries.

Q. Did you testify as to who was driving the car that run over you, the name?

A. A young fellow by the name of—what was his name, I have forgotten?

Q. Well, state whether or not it was Fred Davis, if that was the name?

A. Fred Davis, that was the name, that was the boy.

Q. In driving your car to Lake Tahoe, as you have testified you did, did you take that trip merely for a summer vacation, merely because the ranching season was over?

A. No, I took it on the advice of some persons who said I might get rest if I would go to a higher altitude, and where it was quiet.

Q. How long did it take you to make the trip in the car?

(Testimony of J. B. Daniel.)

A. It took me about twelve hours from Lovelock to Carson City, we remained there over night.

Q. Previous to your accident have you driven that same distance with the roads in approximately the same condition?

A. Oh, drive it in five hours.

Q. Did you suffer any ill effects at that time?

A. Well, we stopped frequently on the road; stopped particularly at Wadsworth for a long time, and at Reno.

Q. Have you driven your car lately, Mr. Daniel?

A. Have I driven the car lately?

Q. Yes. A. Yes.

Q. Do you have any trouble in driving any distance?

A. Driving the car is done, of course, with the arms; my wrists [67] and arms are in pretty good shape, but I get very much fatigued in riding.

Q. You testified something, and were asked some questions concerning interviews with Dr. Walker; how many times did you see Dr. Walker?

A. I saw him twice.

Q. And you said something concerning his giving you a report?

A. The second time he made three X-ray pictures, he gave me a thorough examination, and a diagnosis, and when he got through he said—

Mr. KEARNEY.—Just a moment! Was that report in writing? A. No, it wasn't in writing.

Mr. KEARNEY.—Then we object to it upon the ground it is hearsay.

(Testimony of J. B. Daniel.)

Mr. GOODMAN.—If the Court please, this is a proper question for the reason that on the cross-examination counsel went into the question of this report in such a manner that makes it proper for the witness to explain himself on redirect examination as to what the report was.

Mr. KEARNEY.—The question was withdrawn.

Mr. SPRINGMEYER.—He can't state what anybody else told him.

The COURT.—I don't see any ground where it is admissible on the score of cross-examination.

Mr. GOODMAN.—I mean redirect examination of the cross-examination.

The COURT.—Well, on redirect either.

Mr. GOODMAN.—(Q.) Have you seen or tried to see Dr. Walker recently? A. Yes.

Q. When? A. Monday.

Q. Did you see him Monday?

A. I could not; in the first place I wired to Dr. Walker last week.

Mr. SPRINGMEYER.—We object on the ground it is not responsive. We don't care about this.

Mr. GOODMAN.—We do.

WITNESS.—I tried to see him, and he was out of town.

The COURT.—Just answer no, then; you didn't see him. [68]

Mr. GOODMAN.—(Q.) Mr. Daniel, you testified before that—I will ask permission of the Court to ask this question; probably I asked it in my first examination, as to why he made the statement that

(Testimony of J. B. Daniel.)

he was struck here, and when he got up he was a distance from where he was struck.

Q. You testified, Mr. Daniel, that the car struck you in one spot, and when you recovered yourself on the ground, after the car passed over you, you were some little distance away; how did you know that?

A. My hat was about eight feet back of where I found myself on the ground.

Q. Did you have any other reason for knowing it?

A. Not particularly; there was no wind to blow it back there.

Q. Did you remember anything between the time of the impact of the car with your body and the time when you say you opened your eyes and saw the hind wheels going over you?

The COURT.—Read that question.

(The reporter reads the question.)

Mr. KEARNEY.—That is objected to as based upon something not in evidence; it is not proper redirect examination.

The COURT.—It seems to me that you went into that once before. Didn't he state when he was struck he didn't remember anything until he found himself in front of the wheel, the rear wheel, and that was about to go over him, that he saw it go over him?

Mr. GOODMAN.—I think the testimony was substantially that, your Honor, but I didn't know whether it was made in such a connected manner that the Court or anybody else would understand it.

(Testimony of J. B. Daniel.)

The COURT.—I will allow you to ask the question if you want to find out his mental condition, or whether he knew what was going on at that time.

(The reporter reads the question.)

WITNESS.—Answer that?

The COURT.—You may answer the question, yes.

A. I did not.

Mr. GOODMAN.—(Q.) You said you came from a commissioners' meeting when you crossed the street; were the commissioners in a [69] regular ordinary session that day? A. They were.

Q. For what purpose?

A. For the purpose of adjudicating—

Mr. SPRINGMEYER.—That is immaterial, and objected to on that ground.

The COURT.—I don't see the purpose of it.

Mr. GOODMAN.—The purpose is that the meeting day of the County Commissioners is fixed by law, and this happening on the 28th, it really might be explained that there was a special meeting, that is the only purpose.

Mr. SPRINGMEYER.—We submit, may it please the Court, it is immaterial.

The COURT.—Well, if the objection is made, later it will properly come in as rebuttal.

Mr. GOODMAN.—That is all.

Recross-examination.

Mr. KEARNEY.—(Q.) Do you know how far it is from Lovelock to Reno, Mr. Daniel?

A. Oh, I don't know; in round figures about a hundred miles.

(Testimony of J. B. Daniel.)

Q. Do you know how far it is from Reno to Carson? A. Thirty-one.

Q. And do I understand you to say that you usually drive that in five hours?

A. I never drove at all—

Q. Why did you say that the usual time it takes you to drive that is five hours?

A. I said a man with a good car could drive it in about five hours; that is where I got my impression.

Q. You have never driven it yourself in five hours?

A. No; they say they have driven from Lovelock to Reno in four hours; if they could do that, they could drive up from Reno to Carson in an hour.

Mr. KEARNEY.—That is all.

Mr. GOODMAN.—That is all, Mr. Daniel.

Mr. RICHARDS.—If the Court please, we desire to offer in evidence City Emergency Ordinance number 5, of the City of Lovelock, certified to under the seal of the clerk of the city. [70]

The COURT.—Is there any objection?

Mr. KEARNEY.—We object to the offer, if the Court please, first upon the ground it is not within the issues of the complaint; there is no allegation in the complaint sufficient to support the offer, and it is therefore incompetent, irrelevant and immaterial. There is no issue in the complaint showing that such an ordinance was in force and effect at the date alleged in the complaint, and it therefore becomes incompetent, irrelevant and immaterial. In

(Testimony of J. B. Daniel.)

support of that I desire to read the allegation in the Amended Complaint, which is as follows:

“That at the time stated the said servant was driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part. That such rate of speed at which the said servant was driving the said automobile, at the time he drove the same upon and over plaintiff, was in excess of twelve miles per hour and in violation of Ordinance No. 5 of the City of Lovelock prohibiting the driving of motor vehicles upon streets within the city limits and particularly the street mentioned at a rate of speed greater than twelve miles per hour.”

Now the complaint is absolutely devoid of any allegation which will entitle them to offer this proof, that the said ordinance was in force and effect at the time of the said accident is alleged to have occurred, and without an allegation of that sort, there was no issue raised in the complaint, and we cannot see that there is any materiality in the offer of the ordinance at this time. Under a proper allegation it perhaps might be admitted, but under the present state of the pleadings there is no foundation for it whatsoever.

(Argument.)

(The ruling is withheld until to-morrow morning to give counsel an opportunity to produce authorities.) [71]

Testimony of Mrs. Cora F. Darrah, for Plaintiff.

Mrs. CORA F. DARRAH, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. GOODMAN.

Q. Please state your full name?

A. Cora F. Darrah.

Q. Was your name formerly Davis?

A. It was, yes.

Q. Do you know Fred Davis? A. I do.

Q. Is he related to you? A. Yes, he is my son.

Q. When was he born?

A. On the 16th day of May in 1905.

Mr. GOODMAN.—That is all.

Mr. KEARNEY.—That is all.

Testimony of James A. Meffley for Plaintiff.

Mr. JAMES A. MEFFLEY, called as a witness by plaintiff, testified on direct examination as follows:

“My name is James Albert Meffley. I have lived in Lovelock three years, during which time there has been no change in the condition of the streets. Last Sunday I performed some experiments with a Ford touring car at the request of Mr. Goodman.”
Thursday, June 2d, 1921.

10:00 o'clock A. M.

Court convened.

(It is stipulated that the jury is present.)

Mr. GOODMAN.—We are to take up the question of the introduction of the ordinance this morning.

(Testimony of James A. Meffley.)

Mr. SPRINGMEYER.—The objection made, may it please the Court, was that the ordinance was inadmissible for the reason that it is not pleaded in the complaint that the ordinance was in existence at the time when this accident occurred. We now offer an additional objection, that the ordinance is not pleaded in *totidem verbis*, as required in the pleading of ordinances before evidence as to the existence of such ordinance may be admitted.

(Argument.)

The COURT.—I shall overrule the objection, and admit the ordinance.

Mr. SPRINGMEYER.—We take an exception on the grounds stated in [72] the objection. We will stipulate that you may state what the substance of the ordinance is at the present time, without reading the whole of the ordinance.

(The ordinance is marked Plaintiff's Exhibit No. 4.)

Mr. GOODMAN.—I would like to read section 4. (Reads:)

“Sec. 4. It shall be unlawful for any person to drive, run, propel, operate or cause to be driven, run, propelled or operated, any vehicle on turning corners within the limits of the City of Lovelock, at a speed greater than eight miles per hour, or in the business and school district of said City at a speed greater than ten miles per hour and in all other portions of the city at a speed greater than fifteen miles per hour. The business and school district shall include all of those streets and por-

(Testimony of James A. Meffley.)

tions of streets in the City of Lovelock, described as follows: * * * Provided that this section shall not apply in the case of the police or fire departments of the City of Lovelock nor to any hospital ambulance or physician in answering professional calls.”

The COURT.—What is the date of that ordinance?

Mr. GOODMAN.—Proposed October 16, 1917; passed and adopted October 18, 1917; approved by the mayor on the 18th day of October, 1917.

The COURT.—What is the penalty for violating the speed ordinance?

Mr. GOODMAN.—Section 13 reads: “Any person, firm, association or corporation who shall be found guilty of a violation of any of the provisions of this ordinance shall be punished by a fine of not exceeding \$150 or by imprisonment in the city jail for a period not exceeding thirty days or by both such fine and imprisonment.” And section 14 is a general repealing clause of all ordinances in conflict with it.

If the Court please, we have set forth in our complaint a statute of the State of Nevada regulating motor vehicles, and while that statute has been pleaded, as provided, by title and reference, and it is the rule in Federal Courts that judicial notice is taken of all State statutes, I would ask permission to read section 9 of “An Act to amend sections 2, 9, 11, 24, 25 and 27 of an Act entitled [73] ‘An Act regulating automobiles or motor ve-

(Testimony of James A. Meffley.)

hicles on public roads, highways, parks or parkways, streets, and avenues, within the State of Nevada; providing a license for the operation thereof, and prescribing penalties for its violation; designating the manner of handling the receipts therefrom, and the purpose for which it may be expended, and in what manner, and repealing an act of the same title, approved March 24, 1913,' approved March 24, 1915.'"

Section 9 of that Act reads: "No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person or the safety of any property. Nor shall any person incompetent to properly handle a motor vehicle nor an intoxicated person be permitted to drive the same. No person under sixteen years of age shall be permitted to drive or operate any motor vehicle in any incorporated or unincorporated city or town in this state. For a violation of this section any peace officer may arrest the driver of such motor vehicle and remove from the same the license number plate thereof, and such number plate shall not be restored to the owner thereof except upon payment of \$10 in addition to the fine provided by this act."

The Court taking judicial knowledge of the act, I will not ask to read the other parts of it. I

(Testimony of W. R. McCullough.)
presume the Court accepts that rule as to taking
judicial notice.

The COURT.—No objection to that, is there?

Mr. SPRINGMEYER.—None, your Honor.

Testimony of W. R. McCullough, for Plaintiff.

Mr. W. R. McCULLOUGH, called as a witness by
plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. GOODMAN.

Q. Your name is W. R. McCullough?

A. Yes, sir.

Q. Where do you reside?

A. Lovelock, Nevada.

Q. How long have you resided there?

A. Four years.

Q. Were you there on the 28th day of July, 1919?

A. Yes, sir. [74]

Q. Do you know Fred Davis? A. Yes, sir.

Q. What position did you occupy with reference
to the Rodgers or Reservation ranch on that day?

A. I was employed as superintendent.

Q. Was Fred Davis working on the ranch?

A. Yes, sir.

Q. Do you remember of his having an accident
with an automobile on that day? A. Yes, sir.

Q. Do you know for what purpose he went down
with it from the ranch?

Mr. SPRINGMEYER.—Objected to on the
ground that it is immaterial.

Mr. GOODMAN.—I intend to connect it up, to

(Testimony of W. R. McCullough.)
show it was in the performance of his official duties.

Mr. SPRINGMEYER.—Well, ask him if he was on business of the ranches.

Mr. GOODMAN.—(Q.) Was he on business of the ranches in taking that trip down that day?

A. Yes, sir.

The COURT.—Well, I think it is material to show that he was engaged in the defendant's business, and in the defendant's employ.

Mr. GOODMAN.—(Q.) You employed him, did you not? A. I did.

Q. It was part of his duty to drive automobiles?

A. Yes, sir.

Mr. GOODMAN.—That is all.

Cross-examination.

Mr. SPRINGMEYER.—(Q.) Mr. McCullough, you said you were employed in July, 1919, as superintendent of the Rodgers or Reservation ranches?

A. I was.

Q. For whom were you then employed?

A. I was employed by Mrs. Rodgers.

Q. Is that Mrs. Elizabeth A. Rodgers?

A. It is.

Q. Who paid your salary, Mr. McCullough?

A. I signed the checks myself; Mrs. Rodgers deposited the money in the bank to pay them.

Q. To whom did you account?

A. Mrs. Rodgers.

Q. Who paid the supplies of those ranches?

Mr. GOODMAN.—I object as improper cross-

(Testimony of W. R. McCullough.)
examination. Counsel can make him his own witness, if he desires.

Mr. SPRINGMEYER.—May it please the Court, he said on direct [75] examination that he was employed as superintendent on the Rodgers or Reservation ranches; now I certainly have the right to know whether he was or not; I have a right to find out on cross-examination who his employer was, I submit.

The COURT.—Do you object to that?

Mr. GOODMAN.—Yes, your Honor.

The COURT.—Why?

Mr. GOODMAN.—Upon the ground that it is not proper cross-examination. He said he was employed as superintendent of the ranches; I didn't ask him by whom he was employed.

The COURT.—I guess that is true. He said he was employed, he didn't say by whom. I think that is part of your defense. I will sustain the objection, as that is a part of your defense.

Mr. SPRINGMEYER.—Exception on the ground it is proper cross-examination.

Mr. GOODMAN.—I ask that the evidence relative to by whom he was employed, be stricken.

The COURT.—That may go out as not being cross-examination. It is relevant, but it is not cross-examination.

Mr. SPRINGMEYER.—We take an exception on the ground it is too late; counsel should have objected at the time the questions were asked; and on the further ground it is proper cross-examination.

(Testimony of W. R. McCullough.)

Q. You say you employed Fred Davis?

A. Yes, sir.

Q. Was he working for you, do you mean by that; or was he working for someone else?

A. I mean by that he was working for the Rodgers Ranch, under my supervision.

Q. Well more directly then, for whom was he working, if you know?

Mr. GOODMAN.—I object to that on the same ground; that it is part of the defense in this action; it is attempting to elicit testimony by cross-examination beyond the reasonable limits of the rule.

Mr. SPRINGMEYER.—He said he employed Fred Davis; I am finding out whether he employed him or not.

(By direction the reporter reads the question.)

The COURT.—I don't think that is cross-examination; I think that is part of your defense. [76]

Mr. SPRINGMEYER.—We take an exception to the Court's ruling on the ground that it is proper cross-examination.

Q. In whose employ, if you know, was Fred Davis on the date this accident occurred?

A. He was employed by Mrs. Elizabeth Rodgers.

Mr. GOODMAN.—Object to that as not cross-examination, and as a conclusion of the witness. It is not cross-examination for the reason it does not tend to test the accuracy of this witness's statements, or of the testimony which I have elicited; that it is strictly a part of the defense, and merely an attempt to bring out in cross-examination mat-

ters which are matters of defense: to charge us with binding effect upon which we are not entitled to be charged, and on the further ground that it is a conclusion of the witness.

The COURT.—I will sustain the objection.

Mr. SPRINGMEYER.—We except on the ground it is proper cross-examination.

The COURT.—It looks to me as though you were trying to make out your defense in the cross-examination of this witness.

Mr. SPRINGMEYER.—May it please the Court, if the direct examination of this witness permits that, it is submitted that is quite proper.

The COURT.—That is true, and if it does permit it, this question is certainly permissible; but it is for me to decide what the limits of the cross-examination are under the examination in chief, and he simply asked this witness if he employed this man, and he said he did, and he didn't go any further than that, and he said he was at work on the ranch, and that he was in the performance of the ranch duties at the time he was driving that car. He didn't go any further into the relations between this boy and the owner of the ranch; he didn't go any further into his own relations with the owners of the ranch. Now your questions are intended to go still further, and to draw out any matter that contradicts what this witness has stated, a matter which is essential to your defense as you have alleged it in your answer.

(Testimony of W. R. McCullough.)

Mr. SPRINGMEYER.—(Q.) Mr. McCullough, you testified on direct [77] examination that in July, 1919, you were employed on the Rodgers or Reservation ranches as superintendent?

A. Yes, sir.

Q. That is a fact? A. Yes, sir.

Q. Who operated, managed, or controlled the Rodgers or Reservation Ranches in July, 1919?

Mr. GOODMAN.—That is objected to, your Honor, upon the same grounds.

The COURT.—Objection sustained.

Mr. SPRINGMEYER.—We take exception on the ground it is proper cross-examination. That is all.

Testimony of Dr. William Neave Kingsbury, for Plaintiff.

Dr. WILLIAM NEAVE KINGSBURY, called as a witness by plaintiff, testified as follows:

My name is William Neave Kingsbury. Am forty-one years old. Am a physician and surgeon, graduated in 1904 at the Royal College of Surgeons, London, England, I practiced in London and in the British Army until 1919, when I came to this country. I am now practicing in Reno, Nevada. I have had an extensive experience as a radiologist, and I specialize on the taking of X-ray pictures. I have taken between thirty and thirty-five thousand such pictures.

I met J. B. Daniel, plaintiff, the day before yesterday.

(Testimony of Dr. William Neave Kingsbury.)

Question by Mr. GOODMAN.—And did you make any physical examination of him?

A. I made a thorough physical examination.

Mr. KEARNEY.—We will object to that, if the Court please, on the ground it is too remote; an examination made day before yesterday is of no concern to the Court at this time, nor the jury, some two years after the alleged accident.

The COURT.—I think it would be admissible on that point to show the extent of the injury, and duration.

Mr. KEARNEY.—If the Court please, until it is shown there has been no subsequent injury; until it is shown that the condition that existed at the time of the accident, two years ago, is the same as it is at the present time, there cannot be any connection between something that is not existent, and that existed two years ago. [78] For instance, it might appear that in the meantime numerous natural disabilities had occurred; they may be prevalent now, may occur now, and that could not be tied to something that happened two years ago.

The COURT.—Oh, I think it is admissible on the extent of the injuries which he has suffered. Of course, it should properly be based upon some testimony to the effect that the conditions to which the doctor may testify are not the result of something else, but are in consequence of the injuries which he alleges he received at the time set forth in the complaint.

(Testimony of Dr. William Neave Kingsbury.)

Mr. GOODMAN.—I considered that the plaintiff had testified he had remained at home, and had done nothing since the injury.

The COURT.—Well, he didn't testify that he hadn't fallen down, or had not been injured otherwise, or that the injuries he suffered were not due to some other causes.

Mr. GOODMAN.—I will connect it up.

The WITNESS.—(Continuing.) I took nine photographs of Mr. Daniel, of which I have prints and negatives. I made one of the right hip.

Mr. GOODMAN.—I will offer that in evidence.

The COURT.—Submit it to counsel.

WITNESS.—One moment. That print was not made by me personally; the negative was made by me personally.

Mr. GOODMAN.—Have you the negative?

WITNESS.—That is the negative. There is the negative from which print was made. (Hands to counsel.)

Mr. GOODMAN.—The negative is offered with the print.

Mr. KEARNEY.—We will object to the offer, first, upon the ground that the print is not properly identified as made by the witness; second, upon the ground both print and negative are inadmissible for the reason that they are too remote, not having been taken within a reasonable time after the alleged accident; upon the further ground that there is nothing in the record to show that the same condition did not exist prior to the accident,

(Testimony of Dr. William Neave Kingsbury.)
and there is no connection whatever that this condition, or any condition that might be shown,—anticipating that it might be shown—is the result of the alleged accident; and until and unless some X-ray condition is shown [79] that existed at the time or prior to the accident, what existed subsequent to the accident cannot in any way bind the defendant; and that the admission of X-ray pictures of this kind, under these circumstances, is prejudicial to the rights of the defendant.

The COURT.—Well, whatever is shown to be abnormal in these pictures that are admitted must in some way be connected with that accident that occurred. There is an objection made to one of the exhibits that you are offering, that it was not made by this witness; there is one that he did make, and the other is the copy of it, it is the negative, is it?

Mr. GOODMAN.—It is the negative.

The COURT.—This is correct, is it?

A. That is correct.

Q. You made that yourself?

A. I made that, and developed it.

The COURT.—That may be admitted.

Mr. KEARNEY.—We note an exception upon the grounds stated in the objection.

(The negative is marked Plaintiff's Exhibit 5.)

WITNESS.—(Continuing.) I did not make the print, but it was made in my presence, and is a correct copy.

The COURT.—It will be admitted.

(Testimony of Dr. William Neave Kingsbury.)

Mr. KEARNEY.—Same objection and exception.

(The print is marked Plaintiff's Exhibit 6.)

WITNESS.—(Continuing.) I made and have a negative and a print of the left hip of plaintiff.

Mr. GOODMAN.—If the Court please, we offer this negative and print.

Mr. KEARNEY.—We make the same objection to the offer; and also upon the further ground there is no proper foundation laid for the introduction of the prints, or negatives.

The COURT.—You add to your objection a new ground, that there is no proper foundation laid; in what respect, Mr. Kearney?

Mr. KEARNEY.—With respect to the manner of taking the X-rays, and the purpose for which they were taken, and the particular ailment or disease, whatever it might be, the prints or negatives are [80] supposed to show.

The COURT.—If there was anything improper in the taking of these X-rays, I will allow you to question the witness on that point of the objection, if you wish, before they are admitted.

(The negative is introduced as Plaintiff's Exhibit 7, and the print as Exhibit 8, over defendant's objection and exception.)

The WITNESS.—(Continuing.) I made and have an X-ray negative of the joint between the sacrum and the hip on both sides and the lower four lumbar vertebrae. The print was made in my presence and is a faithful copy of the negative.

(The negative and print were admitted as Ex-

(Testimony of Dr. William Neave Kingsbury.)
hibits 9 and 10, over defendant's objection and exception.)

The WITNESS.—(Continuing.) I made a negative of the first lumbar vertebrae, and of the dorsal vertebrae. The print was made in my presence and is a faithful copy.

(The negative and print were admitted as Exhibits 11 and 12, over defendant's objection and exception.)

WITNESS.—I made an X-ray negative of the upper nine dorsal and the lower three cervical. The print was made in my presence and is a faithful copy.

(The negative and print were admitted as Exhibits 13 and 14, over defendant's objection and exception.)

WITNESS.—I made another X-ray negative of the same part of the body because the other was not clear. The print is a faithful copy.

(The negative and print were admitted as Exhibits 15 and 16, over defendant's objection and exception.)

WITNESS.—I made an X-ray negative of plaintiff's right shoulder joint. The print is a faithful copy.

(The negative and print were admitted as Exhibits 17 and 18, over the defendant's objection and exception.)

The WITNESS.—I made an X-ray negative of the upper six vertebrae. The print was made in my presence and is correct.

(Testimony of Dr. William Neave Kingsbury.)

(The negative and print were admitted as Exhibits 19 and 20, over defendant's objection and exception.) [81]

Mr. GOODMAN.—(Q.) Doctor, you stated that you have studied the X-ray photographs that you prepared of the plaintiff? A. I have.

Q. Do the X-ray photographs, or any of them, in your opinion, derived from an examination and study you have made of them, show any unnatural conditions which may be the result of injury?

Mr. KEARNEY.—We will object to that upon the ground that the pictures are the best evidence, and show for themselves; and upon the further ground that any evidence regarding conditions existing some two years after the accident is too remote to be in any way connected with the accident, and until so connected, the admission of testimony concerning pictures or an examination made two days ago, on the 31st of May, 1921, is prejudicial to the defendant.

The COURT.—Well, it is a serious question whether the ordinary layman who has not had any training, can read these negatives and tell what they mean; and I have never seen X-ray pictures admitted in court that they were not read and explained by an expert. I think that question has never been raised yet, but if there is any question in your mind as to whether a layman can read and understand those pictures, you are at liberty to examine the witness. I think it is a matter of expert testimony. You may answer the question.

(Testimony of Dr. William Neave Kingsbury.)

Mr. KEARNEY.—We take an exception to the ruling of the Court upon the grounds stated.

WITNESS.—In several of those negatives which I took there is evidence of injury.

Mr. GOODMAN.—(Q.) Doctor, I will hand you the negatives and the prints, and will ask you if you will take the negatives or print and show the injury the photographs and the things which you mention as evidence of injury.

Mr. KEARNEY.—Object to the question upon the grounds stated in the former objection.

The COURT.—The objection will be overruled.

Mr. SPRINGMEYER.—The same exception.

WITNESS shows Exhibit 6: This shows an irregularity in the outline of the lower border of the ramus of the ischium, and of the [82] descending ramus of the pubis. That irregularity in itself would not produce any physical effect, but it is the result of peristitis of that bone, due to some injury. Exhibit 8. A similar condition. The irregularities in themselves have no detrimental effect on the patient, but they suggest strongly that the bone has been broken, and it is possible the breakage may have had some effect on the patient's bladder. He could have walked, but might have had pain. Exhibit 10. The last lumbar vertebrae is displaced about a quarter of an inch to the left, and is slightly rotated. The fourth lumbar shows evidence of breakage, the left transverse process being broken and united at an angle. The third lumbar shows evidence of fracture of the

(Testimony of Dr. William Neave Kingsbury.)

spine; the lumbar part of the spinal column is *in toto* displaced to the left, and shows a slight lateral curvature with a convexity to the left. The conditions are not normal and are not common. Injury is the only thing which will cause such conditions. The patient would have pain in the lower part of his back, probable tenderness, some difficulty in stooping and raising himself, possibly his pelvis would become tilted a little, and he would probably be unable to walk as far as if his back were perfectly normal. No treatment will cure the condition. Exhibit 16 shows a lateral curvature of the spine with a convexity towards the left, extending from the fifth cervical vertebrae to the seventh dorsal. It shows the transverse process of the seventh cervical on the left is broken and is not healed up in close apposition. The vertebrae itself is rotated so that the spine points to the left. These irregularities would in all probability cause pain in the lower part of the neck; he may possibly get tenderness at times, depending to a certain extent on the weather; he will have some limitation of movement of the neck. In all probability it will produce pain. Exhibit 20 shows irregularities and bony overgrowth of the lower border of the third cervical, irregularities and bony overgrowth of the upper border of the fourth cervical, irregularity of the upper border and anterior border of the fifth, and bony overgrowth of the upper border of the sixth. These would cause limitation in movement of the neck, pain in movement, and

(Testimony of Dr. William Neave Kingsbury.)

creaking or grating in turning the neck. There is a condition similar to [83] that which is natural, but it always starts in the lower part of the spinal column. There is no evidence in the lower part of the spinal column of this patient that he has any arthritis; and that is in my opinion a traumatic condition, a condition that results from injury. Exhibit 9 again, shows a crack on the right side, fifth lumbar, from the middle of the upper border, running downwards to the right. The crack could be produced from a blow, not by natural causes. Exhibit 12 shows the lower part of the lateral curvature of which I spoke. There is no other evidence of anything abnormal in the middle part of the back, that is in the dosal vertebrae. The same condition is shown by Exhibit 16. Exhibit 18 is a print that does not reproduce in detail. Exhibit 17 is of the joint between the right collarbone and the right shoulder blade, and shows an irregularity of the joint surfaces with a bony overgrowth. From this, plaintiff would get pain in the shoulders. An injury would produce the condition. Exhibit 14 is the same as 16. When I was dealing with 16 I forgot to mention it shows the inner end of the right collar bone is about a quarter to half an inch lower than the inner end of the left collar bone. None of the photographs show any fracture of bones.

The effect of the irregularities and unnatural conditions to which I have testified would be to lower the general health. The man would not feel

(Testimony of Dr. William Neave Kingsbury.)

so well, there should be some difficulty in walking, some pain and tenderness in the spine, particularly the lower part. He would not be able to move his head properly, but would do so with pain, and possibly have pain in his right shoulder joint. It would shorten the distance he could walk; I would be surprised if he could walk over three or four miles at a stretch. None of these conditions are curable.

Mr. GOODMAN.—Did you find from your examination of Mr. Daniel any other unnatural conditions? A. I did.

Q. What were they?

A. I found that he had dropping of his right shoulder.

Mr. KEARNEY.—This does not go to the X-rays. [84]

Mr. GOODMAN.—No.

Mr. KEARNEY.—We will object to it on the ground it is too remote, not sufficiently connected with the date of the accident, and on all the grounds stated in the former objection.

The COURT.—The objection will be overruled.

Mr. KEARNEY.—Exception on the grounds stated.

WITNESS.—He had dropping of the right shoulder; atrophy, not complete, of the big muscle which goes down to his shoulder, the trapezius; he had a certain amount of loss of power in bringing his arm up to his shoulder; and his big biceps muscle was slightly atrophied. Atrophy diminishes

(Testimony of Dr. William Neave Kingsbury.)
the power of a muscle. It is not attended by pain, but the nerve degeneration might cause pain. I have no doubt these conditions are the result of injury.

Mr. GOODMAN.—Doctor, assuming that a man is crossing the street and is run over by a Ford car, the wheels passing over his body, and from left to right, approximately in this direction (showing); and assuming that the man before being run over was struck by the front of the car and thrown a distance of eight feet, in your opinion would it be possible for an injury of that character to produce the conditions you have testified to?

Mr. KEARNEY.—We object to the question on the ground it is based upon facts not in evidence, a hypothetical question based upon a state of facts which do not correspond with the state of facts in the record.

Mr. GOODMAN.—I have attempted, your Honor, to make them correspond. I would like Mr. Kearney to be more definite in his objection.

The COURT.—It seems to me that was about what the testimony was.

Mr. KEARNEY.—There is no testimony that he was struck and thrown eight feet away.

Mr. GOODMAN.—The plaintiff's testimony was to that effect.

Mr. KEARNEY.—His testimony to that effect was that he found his hat at a distance of eight feet.

Mr. GOODMAN.—His testimony also was that he

(Testimony of Dr. William Neave Kingsbury.)
was struck in one [85] spot, and became conscious in another spot.

The COURT.—I think I will allow that question. Of course this is an assumption, and it is an assumption from the evidence which has been introduced, and the fact that he found his hat where he did find it was evidence to him, and evidence to the jury, of how far he was thrown. I will allow the question.

Mr. KEARNEY.—Exception on the grounds stated in the objection.

WITNESS.—Such an injury could produce the conditions I found. I found also that in neither knee was there any knee jerk. On testing the soles of his feet, I found that on stimulation neither great toe responded. That would interfere with his function considerably. He walked with his feet rather far apart, and swayed from side to side. With his eyes shut and feet close together, he stood for but two or three seconds instead of a couple of minutes, as a normal person can before his body sways. These tests indicate some interference between his brain and his legs. That interference is either from the nerves just as they come out of the spinal cord, or actually in the lower part of the cord itself, where the nerves go up in the cord, and it is in that spot in my opinion this interference has taken place. The lateral displacement and injury to his column and bones, and the injury to his nerves, are both the result of the same condition, of the same injury. A man in this condition would not be able

(Testimony of Dr. William Neave Kingsbury.)
to travel from fifteen to thirty miles a day in an automobile, and actively manage a ranch.

Cross-examination.

(By Mr. KEARNEY.)

WITNESS.—I am forty-one. I came direct to Reno from London, eighteen months ago. I am a British subject. I have had an office in Reno since January 5, 1921. I took out a license to practice in Nevada in May, 1921. I have seen bony growth on other X-ray pictures I have taken. It is quite common, especially in old people. It depends upon where we find it as to whether it is in people not injured.

Mr. Daniel had two or three X-ray pictures taken before he came [86] to me. He did not tell me that those pictures did not show anything wrong. The condition of the internal structure of bones but not the position depends upon a man's age. There may be a slight difference, an eighth to a quarter of an inch, in the height of the shoulders of a normal man, without accident, in cases. I do not think much more than that. Practically nobody is absolutely symmetrical, but the differences are slight. One foot may be slightly the larger. One side of the face or skull may be slightly different than the other. If a boy carries heavy weights in one hand, one side will be affected, but not so if he begins when a man. The boy's shoulder might be half or three-quarters of an inch lower. Manual labor causes men to become stooped, but there is practically no alteration

(Testimony of Dr. William Neave Kingsbury.)

in bones, only changes in muscular development. One would have to start labor as a child in order to alter the position of the bones. After twenty-five or thirty it would be impossible to alter the position of the bones.

The irregularities in plaintiff could not be cured. The position of the bones is dependent upon muscles and ligaments, unless bones are locked together. A displacement can be cured only if cared for immediately. If allowed to run, changes take place in the muscles and bones. A normal spine is curved in one direction, but not in two. From before, backwards, it is practically a straight line. From side to side there are four curves. I can't by X-rays from different angles show any kind of curves. It does not depend entirely on the angle, but the angle of the ray has a great deal to do with what is shown on the plate. If a person stands on one leg and throws his body, an X-ray will not show the same as if the person is erect. One can show deviations from the normal, but can't show a fracture if a fracture is not there.

If there is a curve, you can exaggerate it by taking an X-ray picture from an angle. The natural back curve grows greater with age, just as does the neck curve, so that the same conditions would not exist in a man of seventy-two or three as in a young man.

As to X-ray pictures of the shoulders, a patient might so twist his spine or his side or pelvis as to affect the picture. [87]

(Testimony of Dr. William Neave Kingsbury.)

The bony growth on the vertebrae does not exist in young men. As one grows older, his bones become stiffer and his muscles less pliable. If the bony condition exists in a man's neck he could not turn his head quickly through an angle of 45 degrees without experiencing pain. The majority of people, old and young, can twist their heads through an angle of 180 degrees without pain.

Redirect Examination.

(By Mr. GOODMAN.)

I have never found the bony growth shown on the X-ray pictures of plaintiff at the same places on people who had not met with accidents. My X-ray machine is a Victor, and is a good one. When the pictures were taken, plaintiff was lying down, and I arranged his position so that there was no distortion. I took especial care that there should be as little distortion as possible.

The lowering of a shoulder does not necessarily follow hard work. With Mr. Daniel the muscular condition has everything to do with the lowering of the shoulder. The tenacity of the big muscle from the upper part of the back of the neck to the shoulder keeps the shoulder in place. If there is atrophy, that is disappearance of the muscular fibres, the muscle doesn't do everything. It is normal where it throws the shoulder forward by its own weight. The causes of atrophy are direct injury, injury to the nerves or other disease of the nerves. The test I made of Mr. Daniel showed his

(Testimony of Dr. William Neave Kingsbury.)
walking condition, his loss of knee jerk, could not be the result of disease.

There are no lateral curvatures in normal people. A lateral curvature obtains when the spine curves as you look at it from the back. The other natural curvatures are like the figure "S" long drawn out.

Recross-examination.

(By Mr. KEARNEY.)

An atrophied muscle can result only from injury or disease of the nerve. Disease of the nerve can be caused by something besides injury. Paralysis due to clot on the brain will not cause atrophy of a muscle except as the muscle becomes smaller from disuse. Disease of the nerves does not necessarily cause atrophy, but an accident will produce atrophy.
[88]

Testimony of Dr. William F. Crawford, for Plaintiff.

Dr. WILLIAM F. CRAWFORD, called as a witness by plaintiff, testified as follows:

I now reside at Oakland, California, previously in San Francisco. I am an osteopathic physician; graduated from the American School of Osteopathy in 1889. I am not licensed to practice medicine but I am for osteopathy in California. I was in Kansas two years. I am also registered there. I have practiced all the time since I graduated.

(Testimony of Dr. William F. Crawford.)

I first met Mr. Daniel in 1915. I think I treated Mr. Daniel in 1919, after he was recovering from the grippe. I didn't treat him in 1920. I keep books, but I didn't look up those particular dates. In 1919 I treated him in San Francisco. In 1920 after the accident I treated him in Antioch about a month.

I treat the spinal cord and anything in the body. There is no particular point that I direct treatment to. I treat according to what is the matter with the patient. We osteopaths give no internal drug medicine. We correct any dislocations, spinal curvature, contraction of muscular deficiency.

I could not tell without my books the days and months I treated Mr. Daniel in 1919. I gave him a course of treatment. He would come for a couple of weeks, then he might turn up in a couple of months. It wasn't any set treatment, simply a little kind of tonic treatment.

We diagnose from the spinal cord first, to see if there are spinal curvatures. And the nerve supply from the spinal cord goes out to the different organs, and the viscera, and if there is pressure on the nerves to interfere with the blood supply, we correct that. We treat mostly chronic cases, although we treat most everything that is curable. Osteopaths are authorized to treat general diseases.

In February, 1919, Mr. Daniel had a normal spine. There was a slight posterior condition and a slight

(Testimony of Dr. William F. Crawford.)

anterior condition. That is usually the result of age, see? There was no lateral curve, his shoulders were both square, no trouble with his hip. He was in average health. [89]

In May, 1920, in Antioch, I made a physical examination and treated Mr. Daniel for a month. I gave him sixteen treatments.

Q. Can you remember and can you state what his physical condition and the condition of his spine was at the time that you treated him in Antioch?

Mr. KEARNEY.—We will object to that upon the ground it is too remote from the date of the accident and from the date of the former treatment to be of any value here, it is therefore incompetent, irrelevant and immaterial; the treatment given more than a year after the first treatment is too remote from the date of the accident to be competent testimony here.

The COURT.—I will overrule the objection.

Mr. KEARNEY.—We note an exception on the grounds stated in the objection.

WITNESS.—I found his right shoulder was dropped one inch. The results, atrophy. The spinal cord had been twisted, with a double lateral curvature. The hip had been injured. The sacro-iliac articulation had been destroyed; that is an immovable joint, and it can only be moved by a tremendous shock, something like an accident. The articulation is what is called the ilium bone, that represents the back part of the pelvic bone, what

(Testimony of Dr. William F. Crawford.)

articulates with what is called the sacrum or lower part of the spine, and there is no motion to that bone; and unless the shock strikes this way, that is what is called the tuberosity of the ischium, that throws the bone forward, see? If the shock comes from the knee it throws the bone forward and backward; that is the only way that bone can be dislocated, and however slight, it is most serious because hard to correct. When dislocated, we usually find pressure upon the sciatic nerve; we always find the spine injured because it moves the bone from the spinal cord, and we have a weak spinal cord and a weak back.

With Mr. Daniel I should judge the shock was from the knee. It was slight but serious because the bone should not be moved at all. It would take a severe shock to move it.

I found a double lateral curvature in the spine, like the exaggerated [90] letter "S." It is the most serious curvature we have, outside of the extreme posterior curvature. One of the first things you notice is a depression in the nervous system, and any disturbance in the nerve force has its effect on the whole body and disturbs the blood flow, the nourishment of the body.

Q. Did you at that time in Antioch, doctor Mr. Daniel to correct any of the irregularities which you found to exist? A. My treatment—

Mr. KEARNEY.—My objection goes to all this line of testimony on the second treatment, on the grounds heretofore stated.

(Testimony of Dr. William F. Crawford.)

The COURT.—It will be the same ruling and the same exception.

WITNESS.—My treatment was directed to the shoulder. He has lost the power to hold his right shoulder up. If the Court would permit, I would bring Mr. Daniel up here, and I would demonstrate just what I mean by atrophy of the trapezius muscle.

Mr. GOODMAN.—I will ask permission of the Court to allow the expert witness to use his subject.

Mr. KEARNEY.—We will object upon the ground the witness is called as an expert, and we cannot get these demonstrations on Mr. Daniel in the record on appeal, if it should be necessary to appeal the case; I think the witness can describe what he wishes to show so that it may go in the record; and any explanation he cares to make is all right.

The COURT.—Oh, I will allow him to do so if he wishes.

Mr. KEARNEY.—We take an exception to the ruling of the Court on the grounds stated.

WITNESS.—(Illustrating on plaintiff.) When I first treated Mr. Daniel, here is where his shoulder was (indicating on plaintiff); when I treated him in 1920. Now there is a muscle called the trapezius muscle; it has its origin on the occipital bone, goes down the spine to the twelfth dorsal vertebrae, and comes out onto the shoulder; this muscle, if the shirt was off, you could see how it had wasted

(Testimony of Dr. William F. Crawford.)

away, and when a muscle atrophies, when tissue has atrophied, it is almost impossible under any treatment to restore it. That is why I found in treating him in 1920 that this was incurable, that it [91] would never be brought up as long as he lived, because this muscle is lifting the shoulder, drawing it back and pulling it down, has wasted away. It is also used in turning the head; and of course he has not got as good use of the neck as he had at one time. That is the condition that I directed my treatment to in 1920—the shoulder; and I didn't do a great deal to his spine, because at this time in life a lateral curvature cannot be cured. Then my treatment was directed to the hip. When he stands, he stands on one leg, and favors the other one; and you find the person, when they are standing apparently natural on one leg, resting the other, you suspect that the other has received an injury, that there is a weakness there; upon examining him, if you don't find a weakness in the leg, you will in ninety-nine cases out of a hundred, find a lateral curvature, I don't care who the person is.

In later years a lateral curvature cannot be corrected. Mr. Daniel cannot be cured. I look for cardiac development, cardiac trouble with him. Cardiac trouble is any trouble that may develop in heart, interfere with the nervous system, which is the basis or force which controls the blood, and the goes with it. It furnishes the motor power for the blood supply, and anything that interferes with blood cannot flow unless there is a little nerve that

(Testimony of Dr. William F. Crawford.)

the nerve force disturbs the action. The lateral curvature starts between the shoulders, runs off a little (indicating), then goes this way, see? So it takes what is called the cardiac flexus, or nerve supply to the heart. In 1920 Mr. Daniel had no cardiac disturbance.

I think Mr. Daniel is very apt to lose the reflexes; the reflex striking this nerve causes the knee jerk, and when you lose the reflexes you don't have full control of your feet. You are not absolutely sure when you have them in the right place.

Cross-examination.

(By Mr. KEARNEY.)

WITNESS.—I am not a practicing M.D., and not authorized to prescribe medicine. My treatment is adjustatory. I stretch the muscles, I pull them and twist them, and so on. There is no rubbing. The adjustment of the bones is the same way. I have no [92] means of determining a fracture except by the feel. I did not take X-rays. I can determine just how each vertebrae and bone is without an X-ray. The X-ray is valuable, but is not the only way. I might make a mistake in diagnosis of a fracture, but not in dislocation unless the person is very stout.

I tell any slight twist in a bone by mensuration, measuring from fixed anatomical points; palpation and inspection.

I treated Mr. Daniel. I met him in 1915, and I treated him a couple of times after that. I treated

(Testimony of Dr. William F. Crawford.)

him both times in 1919. I treated him twice then. I am not sure I treated him before 1919, but I treated him twice, though, before the accident, or three different times. Probably in February, 1919. It was after 1915.

I first met Mr. Daniel in Solano County, California. I was just introduced to him while there was a real estate boom. I did not become specially well acquainted with him. We never called socially. He called on me professionally. I am acquainted with some of his people, in fact, I have treated a relative of his, an elbow relative so to speak, and I suppose he found out that way.

In 1920 I went out of practice. The last part of 1919 or 1920 I had the flu and had to quit practice. I never practiced in Solano County. I treated Mr. Daniel in San Francisco, with the exception after the accident in Antioch, Contra Costa County. I have no license there, but if a friend comes to me, why I treat them. I am not really in the practice now, because I have not wholly recovered from the flu. I did not have an office in Antioch. I have never discussed this matter with Mr. Daniel, except I measured his shoulder to see if it had dropped any more, just before I came over. I have been with him considerably since I arrived but have not discussed the matter with him at all. There was no need.

The first time I treated Mr. Daniel for insomnia; the second time he was recovering from the effects of the grippe. For insomnia I gave him a pallia-

(Testimony of Dr. William F. Crawford.)

tive, manipulative treatment. Generally an osteopath works on the nervous system. Men go to osteopaths who have dislocated bones and muscles and are not in proper shape. For other ailments they go to regular physicians. [93]

In a palliative treatment for insomnia, we have to get a better distribution of the entire nervous forces; whenever you increase the blood flow, increase the nerve forces, you restore the natural functions of the body. In Mr. Daniels I found what we generally find in people as they grow older. He was just a little bit under, just a little bit run down. As near as I could tell, it was February, 1919. He told me he was troubled with sleep in a high altitude. I simply treated him to get a better function of his nervous system, and better function of the blood flow. I manipulated his spinal cord, by putting him on his side on the table. For instance, you raise the arm up, and get under the ribs, and gradually lift the ribs, and that gives the heart action a little more room to beat, and increases the blood flow; and then you manipulate the liver, get a better action of bile flow; that increases the digestion, helps the bowel action. The whole thing is restoring the functions. I get the patient on the side, and I put his arm over mine, then I manipulate the spine all the way down, see, lifting the ribs a little bit; by lifting the ribs that relieves the intercostal pressure, see. On both sides of the body. I get him on his back, and manipulate the liver, gradually getting the function re-established, getting a

(Testimony of Dr. William F. Crawford.)

better function, see. And that is the method I use in the palliative treatment. I twist his body back and forth, and I manipulate his neck too. It takes about three-quarters of an hour. As a rule Mr. Daniel came about every other day. I treated him about two weeks in February, 1919. Probably three or four months later he came in. He was just recovering from the grippe.

In that case I put an electric pad on the table and get the patient on it, and put another pad on top, and put a quilt over, and turn on the electricity and apply heat. It opens the pores and brings the blood to the surface. It is good for chills or anything of that kind. I treated him about two weeks, a half to an hour daily.

The next time I treated Mr. Daniel was in Antioch, in April, 1920. I examined him in April and treated him in May. I took about two hours for the examination. I measured his shoulder bone. Examined [94] his spine, taking a pencil to mark each vertebrae to see if any was out of line. I measured the crest of the ilium bone, on the level with the fourth vertebrae. The posterior superior spine of the ilium is on a direct line with the second sacral vertebrae. I draw and mark across these, and if there is any deviation, if they are not in the exact level, I know there is something wrong. Then by palpation or depression, I felt that stiffness and soreness, and I discussed what part of his leg hurt most. I think that was enough.

(Testimony of Dr. William F. Crawford.)

On that day Mr. Daniel came for my deposition. He told me he had been in an accident, run over by an automobile.

There are three ways of determining about the spine. One by measurement, one by palpation, and the other by inspection. If you have a trained eye, just as you look at the spine you know whether there is a curve there or not. You determine the extent with a pencil. I know he had a straight spine in 1919. If you run your fingers down the spine, which I always do, if any vertebrae is moved to one side or the other, your finger runs over that, see. If a man told you he had been in an accident, I would make a thorough examination. In 1919 I did not make a thorough examination because he came to me for general constitutional treatment. He didn't tell me there was anything wrong, and there wasn't anything the matter to discover. If there had been in treating him I would have discovered it.

In 1919 his heart was all right, and I think it is all right now. In April, 1920, it was beating too fast. There was no cardiac trouble whatever in 1920.

A man standing on one leg could get lateral curvature of the spine. When a man stops, he will get in the position that rests him most, and upon examining his spine you will find a lateral curvature. Standing on one leg produced it. I find that quite often in the practice in old people or children. In children it is usually from work, carrying books

(Testimony of Dr. William F. Crawford.)

on one side, sitting in a false position. Standing on one leg exaggerates it. The entire spine is twisted in that way into a lateral curvature. A lateral curvature, even in a child, is serious and leads to most anything. Curves come [95] on slowly unless from accident and when long standing can't be corrected. In old people you can't correct them even if you begin treating them immediately because in them is the inter-vertebrae disc or cushion that atrophies and wastes away, and lets the spinal column settle down, and you don't have the flexibility. If there is an accident to-day, and no fractures and not too much laceration of the tissues and the accident were not too severe, you could correct the condition if you began treatment immediately.

A normal healthy man has a pretty good spine. sometimes fleshy people are the worse off, but as a rule one in constant pain or troubled with insomnia does not take on weight.

I treated Mr. Daniel a month in May, 1920, at Antioch. I made sixteen visits, and charged three dollars a visit. As I had no office, I went to his hotel. He never came back for further treatment. I don't think I treated him in 1915, 1916, 1917, or 1918.

Q. Now, isn't it a fact, Doctor, that you testified on the 30th day of April, 1920, before a notary public at Antioch, in reply to a question as follows: "Have you ever treated Mr. Daniel professionally"? Your answer was: "Yes, off and on since 1915; the

(Testimony of Dr. William F. Crawford.)

last time I treated him was in February, 1919,"
Did you so testify?

A. If it is in the deposition I did.

Q. I will ask you if you did not in reply to the following question as I read it, testify: "For what did you treat him in February, 1919? At that time I gave him a general constitutional treatment; there wasn't any special or particular thing which I treated him for that time that I remember of."

A. Yes.

Q. Now how do you remember that you treated him for insomnia? A. Now, that—

Q. Just state whether or not you so testified.

A. I testified to that, yes. But that particular thing wasn't put in, that was all. Insomnia wasn't put in probably; it should have been in there, it should have been put in. [96]

Redirect Examination.

WITNESS.—For insomnia I gave the general constitutional treatment. The examination of the spine shows the patient's condition; you can determine bronchial trouble; you can determine spleen trouble; you can determine liver trouble, because the nerve supply to those different organs have their origin in the spine. The examination may be for malignant growth in the abdomen, methods of palpation to locate the growth. The spine is only one method of diagnosis. I don't believe in tonics, instead I give a palliative treatment. Standing on one leg produces spinal curvature and is a symp-

(Testimony of J. B. Daniel.)

tom of spinal curvature. Where a person has an injury to the hip, why they stand on one leg, and the curvature results from that.

I would not perjure myself for my best friend.

Testimony of J. B. Daniel, for Plaintiff (Recalled).

J. B. DANIEL, plaintiff, recalled.

WITNESS.—I have not had any other physical accidents or injuries since I was run over by the automobile in 1919. Dr. Crawford treated me in February, 1919.

Mr. GOODMAN.—If the Court please, we desire to offer in evidence the original complaint in this action in connection with the original answer of the defendant herein. It is offered for the purpose of showing the admissions which the defendant has made in the verified answer to the verified complaint; and particularly the admission of the third paragraph of the complaint; and it is necessary to introduce both the complaint and the answer for the reason that the answer is: "Third. Defendant admits the matters and things in the third paragraph of plaintiff's complaint contained."

Mr. SPRINGMEYER.—We object, may it please the Court, to the admission of these pleadings, on the ground that judicial admissions, which these are, are never admissible in evidence as such.

The COURT.—Did she swear to the answer?

Mr. SPRINGMEYER.—Yes, may it please the Court.

Mr. GOODMAN.—Personally.

(Testimony of J. B. Daniel.)

Mr. SPRINGMEYER.—She swore to the answer, that is true. As I [97] understand the rule—it is laid down in Wigmore—pleadings as such, are never admissible in evidence. This is what he says at section 1064: (Reads:)

“The pleadings in a cause are, for the purpose of use in that suit, not mere ordinary admissions, but judicial admissions; i. e. they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues.”

That is the ground of our objection. I don't think it is ever proper to offer pleadings in a case, in evidence.

(Discussion.)

The COURT.—I shall overrule the objection.

Mr. SPRINGMEYER.—We will take an exception on the grounds stated in the objection, if the Court please.

Mr. GOODMAN.—Plaintiff rests.

Mr. SPRINGMEYER.—May it please the Court, if plaintiff rests we move the Court for nonsuit upon the following grounds: That the plaintiff has failed to prove a sufficient case for the jury in the following particulars:

First. That the evidence on behalf of plaintiff affirmatively shows the driver of the automobile which struck plaintiff used due care and caution, and was not negligent.

Second. That the evidence introduced on behalf

(Testimony of J. B. Daniel.)

of the plaintiff affirmatively shows plaintiff was negligent.

Third. That the evidence for plaintiff shows affirmatively that plaintiff had the last clear chance to avoid the injury.

Fourth. That the evidence for plaintiff affirmatively shows that the driver of the automobile was not an agent, servant or employee of defendant.

Fifth. That there is no evidence in the case which shows that defendant, Millie Evans, designated in the complaint, or Millie Rodgers, as she says her true name is, was in any way responsible for the operation of the automobile, or that she was the employer of the driver of the automobile, or that the driver of the automobile was in any sense responsible to her for his action, or under her control. [98]

The COURT.—Are any of those matters admitted in the answer?

Mr. SPRINGMEYER.—The only matter admitted in the answer is this, may it please the Court, that the Reservation or Rodgers Ranches were owned by the defendant. Now the law is that ownership of property, for instance, ownership of the automobile driven by Fred Davis, does not create a presumption of the relationship of agency, or of master and servant. That I think is well established under the law.

(Argument.)

(At 4:00 o'clock P. M., the jury is admonished and excused until to-morrow morning at 10:00 o'clock.)

(Argument resumed and concluded.)

The COURT.—The motion for a nonsuit will be denied.

Mr. SPRINGMEYER.—Defendant excepts to the denial of the motion for a nonsuit upon all the grounds stated in the motion, and under the facts as proved by plaintiff, submits the motion should be granted.

Testimony of W. R. McCullough, for Defendant.

THEREUPON Mr. W. R. McCULLOUGH was called to testify as a witness for the defendant, and upon being first duly sworn, testified as follows:

My name is W. R. McCullough.

Mr. McCullough was then asked the following question: If you know, whose money was paid you for services rendered by you on the Rodgers or Reservation Ranches in Pershing County, Nevada, during July, 1919?

Objection was made by plaintiff's attorney on the ground that it calls for a conclusion and that no proper foundation has been made. The Court sustained the objection of the plaintiff.

The witness was then asked if he knew whose money was paid him for services rendered on the Rodgers or Reservation Ranches during July, 1919, to which he answered "Yes."

The witness was then asked the question:

(Testimony of W. R. McCullough.)

“Whose money was paid you for services rendered on the Rodgers or Reservation Ranches in Pershing County, Nevada, in July, 1919?” to which the plaintiff’s attorney objected on the ground that it is a special defense of the defendant and it is not a preliminary question [99] and calls for a conclusion. The Court overruled the objections, and the witness answered that it was the money of Elizabeth A. Rodgers that was paid him for services.

Thereupon the following question was propounded to the witness:

“Do you know whose money was paid Fred Davis for services rendered by him in the driving of the automobile in connection with the Rodgers or Reservation Ranches during July, 1919,” to which he replied “Yes, sir.”

The witness then stated that: Mrs. Elizabeth A. Rodgers furnished the money; that I was in the employ of Mrs. Elizabeth A. Rodgers during July, 1919; that Fred Davis, the driver of the Ford automobile was in the employ of Mrs. Elizabeth A. Rodgers in July, 1919; that it was Mrs. Elizabeth A. Rodgers’ money which paid for supplies used upon the Rodgers or Reservation Ranches during July, 1919, and that it was Mrs. Elizabeth A. Rodgers’ money that was paid to Fred Davis for his services in driving the Ford car in question used in the operation of the Rodgers or Reservation Ranches during July, 1919.

(Testimony of W. R. McCullough.)

Thereupon the following question and answer were propounded and given:

“Who controlled the operation of the Rodgers or Reservation Ranches during July, 1919? A. Mrs. Elizabeth A. Rodgers.”

Thereupon the following took place:

The COURT.—Wait a moment.

Mr. GOODMAN.—The objection goes to that.

The COURT.—That is purely a conclusion, it seems to me.

Mr. GOODMAN.—And I want to renew my objection to the entire examination, as stating conclusions as to whose money, without stating how he knows.

The COURT.—He says he knows, and he said that it was her money. I cannot say now that he don't know. That is a matter for you to draw out on cross-examination. If you want to examine him in advance of these questions, I will permit you to do so; but when he says he knows I cannot presume in advance that he only knows from hearsay.

The witness further testified: “Mrs. Elizabeth A. Rodgers gave [100] me instructions in the control and operation of the Rodgers or Reservation Ranches during July, 1919.”

The objection of Mr. Goodman, on the ground that it calls for a conclusion, was sustained to the following question:

“To whom, if any one, were you responsible for your service and operation of the Rodgers or Reservation Ranches during July, 1919?”

(Testimony of W. R. McCullough.)

The witness McCullough then testified: "I reported to Mrs. Elizabeth A. Rodgers regarding the control of said ranches during July, 1919, and Mrs. Elizabeth A. Rodgers gave me instructions as to the operation and management thereof during July, 1919."

Continuing the witness testified: "Fred Davis has been in my employ driving the Ford automobile for a little more than a month prior to July 28, 1919."

The witness was then asked the following question, to which objection was made, with the following ruling and remarks of the Court:

"Did you see him drive and operate the car at various times?"

Mr. GOODMAN.—That question is objected to as immaterial and irrelevant; and on the ground that it cannot be preliminary to laying any foundation for showing competency.

The COURT.—What is the purpose of that question?

Mr. KEARNEY.—The purpose is to show that the boy was competent to drive the car.

The COURT.—In spite of the statute?

Mr. KEARNEY.—Absolutely, your Honor.

The COURT.—If you show the boy was competent, the statute becomes void?

Mr. KEARNEY.—No, I don't take that view of the law. We are prepared to argue the question now, if the Court wants to hear it.

The COURT.—Yes, I would like to hear it.

(Argument.)

The COURT.—I don't think there would be any question in this case, no matter who was driving the car, if the accident was due to Mr. Daniel's own carelessness, he could not recover; but I would like [101] to see some decision, and undoubtedly you have one, which defines the effect of the failure to obey a statute of this kind, which makes it a misdemeanor for any one under the age of sixteen years to drive a car, when the accident is undoubtedly due either to the carelessness of the man who is injured, or to some negligence on the part of the driver. I don't think that statute makes a particle of difference with the rights of these parties under the law of contributory negligence.

(Argument.)

The COURT.—You may direct your examination to some other point in the case, and we will take this question up later.

Mr. McCullough, the witness, then stated: "Fred Davis was driving an old Ford car, of 1913 model, on July 28, 1919, and it would run, that is about all. I do not know the limit of speed of the car. Fred Davis worked on the car repairing it."

The witness McCullough further testified: "I know Mr. Daniel and saw him on or about the 28th day of July, 1919, in the evening at the plaintiff's home and that within three or four days after the accident I saw the plaintiff Daniel again driving down the road between Lovelock and the Rodgers

ranch. That the plaintiff had two or three children in the back seat of the car and that the plaintiff's wife was in the front seat with him, but I did not talk with the plaintiff at that time. That on the night of July 28, 1919, I talked with the plaintiff. He said he was more or less bruised up but that he would be all right in a day or two. That three or four days after July 28, 1919, the plaintiff was driving an Oakland car and stopped at the Rodgers Ranch leaving the children there for a short time to play with my children. Subsequent to that time I have seen him around Lovelock quite frequently driving a car and I observed no difference in the plaintiff's manner or method of driving the car then prior to July 28, 1919.

That I met the plaintiff on the road many times; I met him on the streets of Lovelock frequently after July 28, 1919. I know Dr. Smith of Lovelock, Nevada, who visited the plaintiff on July 28, 1919, and he was in Lovelock on last Saturday prior to the trial. [102]

I have seen and know Mrs. Rodger's signature, and the check marked Defendant's Exhibit "A," reading as follows:

Defendant's Exhibit "A."

"Lovelock, Nevada, July 28, 1919.

No. 364.

LOVELOCK MERCANTILE BANKING
COMPANY.

94-29

RODGERS Pay to Lovelock Mercantile Banking
RANCH Co. or order \$3000.00. x x x THREE
Lovelock THOUSAND DOLLARS ONLY x x x
Nevada Pay Roll a/c

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Jul. 30, 1919.)

is a check which I received from Mrs. Rodgers for pay-roll account upon my request.

The Rodgers Ranch designates a ranch located in Pershing County near Lovelock, Nevada; it is not a corporation so far as I know. It simply designates the ranch owned by Mrs. Rodgers at Lovelock, at least operated by her.

I purchased supplies from the Lovelock Mercantile Company while superintendent. The instrument, Defendant's Exhibit "B," you hand me contains Mrs. Rodgers' signature. It is a check reading as follows:

Defendant's Exhibit "B."

"Lovelock, Nevada, July 28, 1919.

No. 358.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to Lovelock Mercantile Co. or
RANCH order \$122 52/100. x x x One Hundred
Lovelock Twenty-two Dollars Fifty-Two Cents
Nevada x x x RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

Nevada Paid Jul. 30, 1919.)

The money of the first check, Defendant's Exhibit "A," was used for the pay-roll account by myself. The other checks were used to pay the bills for the current month.

Defendant's Exhibit "C" is a check signed by Mrs. Rodgers used for the payment of bills; the check is marked Defendant's Exhibit "C," which reads as follows: [103]

Defendant's Exhibit "C."

"Lovelock, Nevada, July 28, 1919.

No. 359.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to Hobart Estate Company or
RANCH order \$10 24/100. x x x Ten Dollars

Lovelock Twenty-Four Cents x x x Dollars

Nevada RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Aug 5, 1919.)

Defendants, Exhibit "D," a check, is signed by Mrs. Elizabeth A. Rodgers, used for the account of Harris Manufacturing Company to pay bills, which reads as follows:

Defendant's Exhibit "D."

"Lovelock, Nevada, July 28, 1919.

No. 360.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to Harris Manufacturing Co. or
RANCH order \$198 60/100. x x x One Hundred

Lovelock Ninety Eight Dollars Sixty Cents x x x

Nevada Dollars. RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Aug. 1, 1919.)

Defendant's Exhibit "E" is another check signed

by Mrs. Elizabeth A. Rodgers, which reads as follows:

Defendant's Exhibit "E."

"Lovelock, Nevada, July 28, 1919.

No. 361.

LOVELOCK MERCANTILE BANKING
COMPANY.

94-29

RODGERS Pay to Overland Garage or order
RANCH \$338 45/100. x x x Three Hundred
Lovelock Thirty Eight Dollars Forty-Five Cents
Nevada x x x Dollars.

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Jul. 30, 1919.)

Defendant's Exhibit "F" is another check signed by Mrs. Elizabeth A. Rodgers, and reads as follows: [104]

Defendant's Exhibit "F."

"Lovelock, Nevada, July 28, 1919.

No. 363.

LOVELOCK MERCANTILE BANKING
COMPANY.

94-29

RODGERS Pay to Nevada Packing Company or
RANCH order \$71 43/100. x x x Seventy-One
Lovelock Dollars Forty-Three Cents x x x Dol-
Nevada lars.

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

Nevada Paid Jul. 31, 1919.)

(Testimony of W. R. McCullough.)

Defendant's Exhibit "G" is another check containing the signature of Mrs. Elizabeth A. Rodgers, which reads as follows:

Defendant's Exhibit "G."

"Lovelock, Nevada, July 28, 1919.

No. 358a.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to C. F. Erickson or order
RANCH \$27 25/100. x x x Twenty-Seven Dol-
Lovelock lars Twenty-Five Cents x x x Dollars
Nevada

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Jul. 31, 1919.)

Thereupon the following question was propounded to the witness:

Mr. KEARNEY.—Did you receive any supplies as superintendent for Mrs. Rodgers from the Lovelock Mercantile Company in July, 1919? A. Yes.

Mr. GOODMAN.—I object to the form of question "as superintendent for Mrs. Rodgers," it states a conclusion which is not in evidence.

The COURT.—I will sustain the objection to that question.

Mr. KEARNEY.—(Q.) While in the employ of Mrs. Elizabeth A. Rodgers, during the month of July, 1919, did you purchase for the Rodgers Ranch

(Testimony of W. R. McCullough.)

in Pershing County, Nevada, any supplies from the Lovelock Mercantile Company?

Mr. GOODMAN.—I object, if your Honor please, on the same ground. The question is framed to get an answer to a conclusion; when you were in the employ of Mrs. Elizabeth A. Rodgers; that is a question on direct examination. He may testify as to who hired him, where he was working, what he did there, but he cannot testify to [105] the conclusion for whom he did it. It is a conclusion to be arrived at by the court and by the jury, not by the witness.

Mr. KEARNEY.—It is during the course of his employment for the Rodgers Ranch.

The COURT.—It seems to me these facts should be placed before the jury, for the jury to draw their own conclusion. You are attempting to prove that Mrs. Rodgers, rather than the defendant in this case, was the person who employed Fred Davis, and you are attempting to prove it by the way in which the property was managed; it seems to me the naked facts should be placed before the jury, so that they can draw their conclusions.

Mr. KEARNEY.—(Q.) You have already testified that Mrs. Elizabeth A. Rodgers gave you instructions as to the operation and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada?

(Testimony of W. R. McCullough.)

Mr. GOODMAN.—I object, may it please the Court. He might state what his instructions were, but I object to the question as calling for the conclusion that it was pursuant to instructions.

The COURT.—I think so, too. Why can't you have him testify that he bought certain things, and show what he did, instead of attaching to the question an answer which brings out a conclusion of the witness, or brings out his opinion. Ordinarily these objections would not receive much consideration, but in this particular case the relationship between this witness and Mrs. Rodgers or Mrs. Evans, and between Fred Davis and Mrs. Evans or Mrs. Rodgers, is a very important issue, and you are attempting to prove it by circumstantial evidence. I think the circumstances should go to the jury, without the conclusions of the witness. I want to let you prove all the facts you can, showing what was done on that ranch, but I think you had better divorce your questions from the conclusions.

Mr. KEARNEY.—We take an exception to the ruling of the Court.

I purchased supplies for the Rodgers Ranch from the Lovelock Mercantile Company during the month of July, 1919, which were delivered to the Rodgers Ranch. They were paid for. I bought the [106] supplies, got the bills, O. K'd them, mailed them to Mrs. Elizabeth A. Rodgers and she paid the bills.

Mr. GOODMAN.—I object and move the last part of the answer "and she paid the bills" be

(Testimony of W. R. McCullough.)

stricken because that is not shown to be from the witness's own knowledge, simply a conclusion.

The COURT.—That may go for the present.

The money represented by check marked Exhibit "A" marked "Payroll" was paid out in wages by me personally. I paid it to the men employed on the Rodgers Ranch. I paid Fred Davis with part of it for his services during the month of July, 1919.

Thereupon, on cross-examination of Mr. McCullough by Mr. Goodman, the witness testified as follows:

No other person signed a similar instrument to this check for the Rodgers Ranch during the month of July, 1919; there were no other checks during that month. There were other checks no doubt in relation to the ranch business for the payment of bills signed by Mrs. Rodgers. I haven't those checks. She was at that time the only one who paid the bills. I would not swear that nobody signed the checks but your question was whether anybody ever signed a similar check to that. I could not swear that no one signed one similar in form.

Mr. GOODMAN.—(Q.) When were you first employed on the Rodgers or Reservation Ranches?

Mr. SPRINGMEYER.—Objected to on the ground it is not proper cross-examination. The direct examination was limited to his employment during the month of July, 1919, and it is immaterial.

The COURT.—I will allow that question.

(Testimony of W. R. McCullough.)

Mr. SPRINGMEYER.—We take an exception on the ground stated in the objection.

WITNESS.—When was I first employed there?

Mr. GOODMAN.—Yes.

WITNESS.—I went to work there on the 15th day of May, 1917.

Q. And will you state by whom you were employed on the 15th day of May, 1917; that is, with whom you made the agreement of employment?
[107]

Mr. SPRINGMEYER.—It is not proper cross-examination and objected to on that ground; it does not apply to matters brought out on direct examination.

The COURT.—Your contention is that he was in the employment of Mrs. Elizabeth A. Rodgers and he has testified to that.

Mr. KEARNEY.—He has testified that he was in her employment during the month of July, 1919.

Mr. SPRINGMEYER.—All our questions were limited to the month of July, 1919, and we expressly limited the time in each of the questions.

The COURT.—Did you object to that question?

Mr. GOODMAN.—Yes, I objected to all the questions by whom he was employed.

The COURT.—Well, if I overruled that objection, I think under the circumstances that is a conclusion.

Mr. GOODMAN.—I am asking with whom he made his arrangement for employment.

(Testimony of W. R. McCullough.)

Mr. SPRINGMEYER.—We object to that on the further ground it calls for a conclusion of law.

The COURT.—Has he testified with whom he made the arrangements?

Mr. SPRINGMEYER.—No, not on direct examination. There is no evidence as to who he made the arrangement with.

The COURT.—Well, I think under the circumstances I should have sustained the objection when he testified that he was in that employ, because that would be a conclusion. You are both highly technical in this matter, and we must keep out all the conclusions; so that conclusion will have to be stricken unless he can inquire as to the relation of employer and employee between him and Mrs. Rodgers and when it arose; so that will all be stricken out.

Mr. GOODMAN.—What will be stricken?

The COURT.—His answer to the effect that he was in her employ during the month of July, unless the question will be permitted as to when he entered into that employment.

Mr. GOODMAN.—If the Court please, there is a definite theory I am proceeding on. If the Court cares to know my theory, it will [108] probably throw light on the examination. The theory on which I am proceeding is that I expect to draw from the witness the fact that he received orders from different persons on this ranch during the time that he was there; and from that urge the conclusion that if Mrs. Rodgers was anything, that

(Testimony of W. R. McCullough.)

she was merely a manager for her daughter, the same as her daughter had employed other managers.

The COURT.—I think I will change that ruling; and the testimony that he was employed during that month will be stricken, and you can question him as to the facts constituting his employment, and how he came into her employment.

Mr. GOODMAN.—(Q.) The first date you gave me was the 15th of what? A. 15th of May, 1917.

Mr. KEARNEY.—We take an exception to the ruling of the Court on the grounds stated.

The COURT.—The exception will be noted.

Mr. GOODMAN.—(Q) On the 15th of May, 1917, you had a conversation relative to employment on the Rodgers Ranch with a Mr. Ramsey, did you not?

Mr. SPRINGMEYER.—Objected to as not proper cross-examination; there is nothing in the record regarding that brought out in the direct examination.

The COURT.—It may be used for impeachment, I don't know.

Mr. SPRINGMEYER.—There can be no impeachment of any matter not brought out on the examination in chief.

The COURT.—That is true. I don't know what it is, and I don't imagine there is any purpose in contradicting him in what he has not said.

Mr. SPRINGMEYER.—We take an exception to the ruling of the Court on the grounds stated in the objection.

(Testimony of W. R. McCullough.)

The COURT.—You may have an exception. You may answer. Read the question.

(The reporter reads the question.)

Mr. SPRINGMEYER.—We object on the further ground it is hearsay.

The COURT.—Answer that yes or no. [109]

A. No.

Mr. GOODMAN.—(Q.) Did you have a conversation relative to your employment on the Rodgers Ranch as superintendent with Mr. Ramsey before that date, or approximately that date?

Mr. SPRINGMEYER.—Objected to as not proper cross-examination, immaterial, and not binding on the defendant.

The COURT.—The objection is overruled. Answer the question yes or no. A. I did.

Mr. GOODMAN.—(Q.) And in that conversation you agreed to—

The COURT.—If you are going to use it for the purpose of impeachment you will have to state when and where the conversation occurred, and just what he said.

Mr. GOODMAN.—(Q.) Where did you have this conversation, Mr. McCullough?

A. In the Riverside Hotel, in Reno.

Mr. SPRINGMEYER.—We object as not proper cross-examination. To save time we will except to all this line of questioning. May it be understood that objection is made and exception taken?

The COURT.—No, I would rather you would except to each one. It is always permissible to

(Testimony of W. R. McCullough.)

show that the witness on the witness stand has made statements elsewhere not in harmony with statements he has made on the stand, and it is on that theory I am allowing these questions; but there may be some other objection that is valid.

Mr. KEARNEY.—Exception to the ruling.

Mr. GOODMAN.—(Q.) Who was present, if anybody, besides yourself and Mr. Ramsey?

A. Nobody.

Mr. GOODMAN.—He said he was employed on the Rodgers Ranch or got his employment from Mrs. Elizabeth A. Rodgers. Is that still in the record?

The COURT.—Yes, that is still in the record.

Mr. GOODMAN.—Now I desire to show that his first employment was not by Mrs. Elizabeth A. Rodgers on the ranch when he originally went to the ranch.

The COURT.—You may go into the question as to when he was employed and how he was employed.
[110]

Mr. SPRINGMEYER.—That was objected to, your Honor, and your Honor sustained the objection.

Mr. GOODMAN.—How did you happen to first go on the Rodgers Ranch and superintend it?

Mr. SPRINGMEYER.—Objected to on the ground it is not cross-examination.

The COURT.—I will allow the question.

Mr. SPRINGMEYER.—Exception on the grounds stated in the objection.

(Testimony of W. R. McCullough.)

Mr. KEARNEY.—Is that limited to the ranch or to the employment by Mrs. Rodgers?

Mr. GOODMAN.—To the Rodgers Ranch.

Mr. KEARNEY.—We object to that on the ground it is not within the scope of direct examination.

The COURT.—It strikes me it is perfectly within the limits of your cross-examination. You may answer the question.

A. I hired to go there as superintendent.

Mr. GOODMAN.—By whom was the offer made to you?

Mr. SPRINGMEYER.—Objected to on the ground it is not cross-examination.

The COURT.—Objection overruled.

Defendant excepts.

A. G. H. Ramsey.

Mr. GOODMAN.—(Q.) And you accepted the offer, and went there? A. I did.

Q. After going there did you take orders from Mr. Ramsey as to the management of the ranch?

A. I did.

Mr. SPRINGMEYER.—Objected to as not proper cross-examination.

Objection overruled. Defendant excepts.

Mr. GOODMAN.—(Q.) And for what period of time after you went there did you continue to take your instructions from Mr. Ramsey as to the management of the ranch?

A. Until the first day of March, 1919.

Q. Did you see any checks previous to the first

(Testimony of W. R. McCullough.)
day of March, 1919, [111] printed in form similar to the checks that are in evidence?

Mr. SPRINGMEYER.—Objected to as not proper cross-examination.

The COURT.—I will allow the question.

Mr. SPRINGMEYER.—Exception on the grounds stated in the objection.

A. I did.

Mr. KEARNEY.—I move the answer be stricken for the purpose of making a further objection. The question calls for his opinion as to whether or not similar checks were drawn. Now, they may be similar in some respects, but if they are not identical, with the exception of the signature, etc., I don't think it is a proper question.

Mr. GOODMAN.—I said similar in printed form.

Mr. KEARNEY.—In printed form. All right.

Mr. GOODMAN.—(Q.) Were any of those checks signed by Mr. Ramsey? A. Yes.

Q. As a matter of fact, Mr. McCullough, he signed practically all of them, did he not?

A. All of them up to the first day of March, 1919.

Q. During that time did you ever see a check which was signed by Millie L. Evans personally, drawn on the Rodgers Ranch at all?

Mr. SPRINGMEYER.—Objected to on the ground it is not cross-examination.

Objection overruled. Defendant excepts.

A. No.

Mr. GOODMAN.—(Q.) Did you at any time during your entire employment on the ranch ever see

(Testimony of W. R. McCullough.)

a check drawn on the Rodgers Ranch, similar to this, signed by the defendant, Millie L. Evans?

A. No.

Mr. SPRINGMEYER.—Exception on the same grounds, on the ground it is not cross-examination.

The COURT.—He has answered no.

Mr. SPRINGMEYER.—I move the answer be stricken until the exception is noted.

The COURT.—Well, the exception will be noted.

The check of \$3,000.00, Exhibit “A,” was used for the pay-roll. [112] Some checks were mailed direct to me and others mailed direct to the parties, I cannot say which they were. I can swear positively that the \$3,000.00 represented by Exhibit “A” was all used for pay-roll account; I paid out the entire sum myself. The account in the Lovelock Mercantile Banking Company is kept in the name of the Rodgers Ranch pay-roll account. The bills which I paid as superintendent while on the ranch were drawn on the pay-roll account.

Fred Davis’ mother telephoned to me, and I told her to send her son out and he came down and went to work. His duties required him to bring supplies to the ranches and men back and forth from town.

I would like to make a little correction to the checks as I stated this morning. The checks signed by Mr. Ramsey that I saw, and I believe there were all the same, contained the printed words beneath the signature “general manager.” The checks issued by me in payment of the pay-roll account contained the printed statement that it was for ser-

(Testimony of W. R. McCullough.)

vices rendered. The word "manager" appeared on the checks while I was employed under Mr. Ramsey.

Q. Did your own name appear on that pay-roll?

A. Yes, sir.

Q. And you paid this from the funds which were deposited to the Rodgers Ranch account in the bank to pay-roll account? A. I did.

Q. You did that each month, did you not?

A. I did.

Q. And every month while you were employed on the ranch you were paid from the Rodgers Ranch pay-roll account? A. I was.

Q. And the Rodgers Ranch pay-roll account was kept in the bank under the same name all the time you were employed there, wasn't it, Mr. McCullough?

Mr. SPRINGMEYER.—Objected to on the ground it is not proper cross-examination, and is immaterial.

Objection overruled.

Mr. SPRINGMEYER.—We take an exception on the grounds stated in the objection.

Mr. GOODMAN.—(Q.) Did you answer?

A. I cannot answer that positively. [113]

I drew the checks each month. I cannot specify the articles I bought from C. F. Erickson in July, 1919. I don't know the amount of merchandise I purchased in July, 1919; I don't try to remember those things. I have explained to you here before in answer to a question heretofore similar to that,

(Testimony of W. R. McCullough.)

that I O. K.'d the bills and they were paid and the receipts returned to me by the parties those checks were sent to, except the pay-roll account. I don't remember exactly the amount of the pay-roll check for July, 1919.

I said that I saw Mr. Daniel driving down the road after the accident. He stopped at our home ranch. It is not a fact that Mrs. McCullough or myself took him back to town on that occasion. The ranch house is about five miles from town, the roads are in fair condition.

I never paid any special, personal attention to the Ford car Fred Davis was driving on that particular day. I had occasion to drive it myself sometimes. We generally tried to keep the brakes in fair shape, as good as possible considering the kind of car it was. I guess probably they were average with any other car. It was an average Ford car. Mr. Daniel was driving an Oakland car the day I saw him. It was not a Pullman car. It was within a week after the accident; I am sure.

On redirect examination by Mr. KEARNEY, Mr. McCullough testified as follows:

Some of the checks in evidence were mailed direct to me and delivered personally in payment for the supply bills; others were mailed direct to the parties themselves. Mrs. Elizabeth A. Rodgers forwarded them to me. She is the only one I sent the bills to at that time. I had frequent conversation over the long distance telephone with Mrs. Rod-

(Testimony of W. R. McCullough.)

gers but I could not give the dates now or say just when.

On cross-examination by Mr. GOODMAN, Mr. McCullough stated:

Check marked Exhibit "A" was not received by me directly from Mrs. Rodgers. I first saw it yesterday. I first saw the other checks exhibited to me here, yesterday. [114]

Thereupon, Mr. FRED DAVIS was called as a witness for the defendant, and after being duly sworn testified as follows:

Testimony of Fred Davis, for Defendant.

My name is Fred Davis. I live in Hazen, Nevada; that during the years 1917, 1918 and 1919, I lived at Winnemucca and Lovelock, Nevada. That prior to 1917, I lived on the Owyhee River. That I first drove the Ford car at the Rodgers Ranch in the latter part of June, 1919. I had been driving cars two or three years prior to that time. I am familiar with the workings of a Ford car and its machinery. I had occasion immediately prior to July 28th, 1919, and subsequent to the time I started to drive the Ford car in June, 1919, to examine the machinery and parts of the car and to make repairs on it. I tightened the bands and the differential so it would work better. The bands that I tightened are the ones that start the car, the brake band and the reverse band. The band on the left-hand side is

(Testimony of Fred Davis.)

the band to start the car on low gear; the one in the middle is the reverse, to make the car go backwards; and the one on the right-hand side is the brake to stop the car with. I tightened them all; also the brake band; afterwards I tried them all and they all worked in good shape. The low band was worn out and did not work very well. It would not take hold. It was so badly worn and would not propel the car fast enough to shift into high gear. The engine would jump and buck if it didn't have the right speed to drop into high and one would have to start in low again; one must travel six miles an hour to go from low gear to high gear. The brakes and differential bands worked fine after I tightened them up; they were not worn. I drove the car on July 28th, 1919, and nearly every day prior thereto, but some days the bookkeeper drove it. I drove it on other days during July and also in June.

The Court thereupon intervened, stating as follows:

The COURT.—Are you proving his competency, Mr. Kearney?

Mr. KEARNEY.—No. This is under his knowledge, showing the condition of the car. I won't offer it for the purpose of showing competency now.

The COURT.—I don't see how that shows the condition of the car; it shows his familiarity with the car. [115]

Continuing, the witness testified:

(Testimony of Fred Davis.)

I drove the car to the town of Lovelock on July 28th, 1919, in the afternoon, entering the city from the west end of 4th Street. I crossed the railroad track and proceeding westerly from there and stopped in front of the First National Bank, a point which I marked with my pencil on Defendant's Exhibit "H." I stopped near the easterly part of the building at the point marked on Defendant's Exhibit "H" with the letter "A." I got out of my car at that point. I went to the postoffice just west of the First National Bank Building, next to the corner marked "Cash Grocery," indicated on Exhibit "H" by the letter "B." I went directly back to the car from the postoffice. There was a pile of sand in the street in front of the First National Bank Building; also a large pile of lumber used for remodeling the First National Bank Building. My car was parked on the east side of that pile of sand which is marked with the circle on Exhibit "H." The sand extended 10 or 15 feet out into the street, or about one-third the distance across the 60-foot street. On coming back to my car, I saw Mr. Daniel, the plaintiff, as he stepped off the sidewalk in front of the Mascot bar on the opposite side of the street, which is indicated on Plaintiff's Exhibit "H," almost opposite the First National Bank Building, which is marked with the letter "C." Mr. Daniel was going toward the postoffice from "C" toward "B" on Plaintiff's Exhibit "H." After seeing Mr. Daniel step from the sidewalk, I cranked the car, got in and backed

(Testimony of Fred Davis.)

the car so I could go around the sand pile and turn into the street. I was travelling westerly in the direction toward the postoffice, which is approximately 100 feet from where I got into the car. The low band on the car was worn and would not take hold, and I had to go quite a distance before I could get into high gear. I must travel six miles per hour before I could pick up on high gear without killing the engine. I saw Mr. Daniels probably 40 feet ahead of me in the middle of the street. I then sounded my horn. Mr. Daniel was travelling toward the postoffice. He was 30 or 40 feet in front of me when I sounded the horn, and I was about one-half way between the curb and the middle of the street, and as I got up about a step or [116] two away from him, he turned around and stepped back and grabbed hold of the fender and he was knocked down and the front wheel passed over his right leg. He was out of my line of travel before he stepped back. If he had stood still, my car would not have struck him. He was not running at any time across the street, but was walking. His handprints were left in the dust on the fender, and I also saw him take hold of the fender. The front wheel on the right-hand side of the car passed over his leg. I had just dropped into high gear and was driving not over ten miles an hour. I cannot tell how many feet I had travelled after I had speed enough to drop into high gear, but probably 20 feet. I had difficulty in dropping into high gear. The engine bucked and jerked as there was

(Testimony of Fred Davis.)

not enough speed to hold the engine in high. I stopped the car in half its length after Mr. Daniels was struck. When I stopped, he was between the front and hind wheel and picked himself up. He then walked across the street to the postoffice. I turned the car to the left away from him that took the car off his leg. He was between the front and the hind wheel when he arose and went into the postoffice. I got out of the car and followed him and caught up with him in the postoffice door. I laid my hand on his shoulder and asked him if he was very badly hurt. He said no, and the rest I could not catch; but probably swore; he was very mad. My car was right opposite the postoffice when I stopped and got out of it and left it standing when I went after him to ask him if he was hurt. The car was about 30 feet from the sidewalk line. The front wheels were probably in the middle of the street, and the hind wheels closer to the postoffice. The marked "D" on the map, Plaintiff's Exhibit "H," shows the position where the car was stopped. There were other cars on the street at that time; one was moving and two were parked right opposite the bank across from the postoffice building in front of the Mercantile Bank. Mr. Daniel jerked away from me and swore when I met him in the postoffice. I then went back to my car and drove off.

On cross-examination by Mr. GOODMAN, Mr. Fred Davis testified:

I was sixteen years old on the 16th of May this

(Testimony of Fred Davis.)

year. I adjusted and fixed up the differential on the car. The differential [117] is where the gears are situated, the gears that start and control the car, up near the back of the engine under the driver's feet; situated very near the middle of the car, in fact they are in the middle of the car and control the starting and stopping and speed of the car. The differential is the only part of the car which I repaired. Other parts needed repairing. It was not difficult to stop the car, but was difficult to start it. I stopped behind a pile of sand in front of the First National Bank. The car did not work very good coming up from the ranch. I went in low possibly half the distance between the postoffice and the place where I was parked, the whole distance being probably 100 feet. I went possibly more than 50 feet in low. I remember it was hard to start in low and I remember I had to go sometimes a long distance in low to get it started fast enough. I was not looking at the building to measure the distance. In an ordinary Ford car in good working condition, you can start out in low and at 10 feet drop into high; that Ford was in very bad working condition and it naturally would take quite a distance; and I remember I have started out at the Big Fifteen Ranch and from the house to the gate is probably 200 feet, and I have sometimes gone over half way to that gate before I could drop into high. My assumption on the distance I travelled in low in starting that day is an estimate. The car needed a general overhauling.

(Testimony of Fred Davis.)

The best that the car could make was 25 or 30 miles an hour. I never went that fast in the streets of Lovelock, but tested it out on the road to town and to the Tule Ranch. I had no speedometer on the car that day. I was travelling not to exceed 10 miles an hour when Mr. Daniels was struck. I know that there is no Ford like that that will make that speed in that distance, and you cannot go that speed in low with that Ford. I saw Mr. Daniels leave the sidewalk in front of the Mascot Bar. I did not see Mr. Daniels during all of the time between the time he left the sidewalk and the time that he was struck. I did see him just before the collision when he crossed in front of me. At the time Mr. Daniel was 40 feet from me, he was right in front of me. I thought he was going to be passed and out of my way and there was no danger. I sounded my horn, as it is the usual thing when anybody is in front of me. I was coming westerly with [118] my car and Mr. Daniels was out of the way, and he stepped back and grabbed the light and the fender. He was entirely in the clear at that time. When he fell, his feet would be a little under the car and the rest of his body in the clear. That is as far as my knowledge is of it. I observed it that way. Mr. Daniels was probably five feet from the curb before he stepped back. He stepped back two or three feet. It may have been one step and may have been two steps. It was probably two, for he had to turn and take one step. If he had gone on, he would have been

(Testimony of Fred Davis.)

struck. The front wheel ran on to his toe and the car passed over a part of his leg. I had a conversation with Mr. P. H. Wolf immediately afterwards in front of the postoffice while the car remained where it was stopped as shown on the defendant's map Exhibit "H." I have recently discussed the incident and have always related the circumstances exactly as I have here as far as I could. I remember discussing the matter in Mr. Goodman's office, and estimated at that time that I was travelling under 12 miles an hour. I described it to you in your office as I did to anybody else. I may have left out a few little points, but the whole thing is the same. I had brought some laundry from the ranch to be laundered. After the accident, I delivered the laundry. It was in the front seat in one of those laundry bags about one-third full. It was small. It did not interfere in any way with the operation of the car. I used the emergency brake in stopping at the time of the accident. I was not in the car at the time I saw Mr. Daniel leave the sidewalk at the Mascot. I got into the car immediately afterwards. It might have been a couple of minutes or less. I was in the car driving when I saw him again. My car moved only half its length after the accident. I have never measured the length of a Ford car. Mr. Daniel's handprints were left on the car in the dust. I brought no men to town from the ranch that day. I tested the car out when I had a good stretch to run it. The condition of the engine and

(Testimony of Fred Davis.)

the differential determine how fast it would go. With the differential fixed up, it would go better but not faster. The roads from the ranch to Lovelock were not very good after they put gravel on. The roads in town were very bad. You [119] cannot go slow on it without getting your neck jolted. I never ran fast in town.

On redirect examination, Mr. Davis testified as follows:

While I was working for the Western Union, Mr. Goodman asked me to come to his office.

On recross-examination, the witness testified:

I do not remember how long that was after the accident.

Testimony of Mrs. Warren B. Flick, for Defendant.

Mrs. WARREN B. FLICK was thereupon called as a witness for the defendant, and after being duly sworn, testified as follows:

My name is Mrs. Warren B. Flick. I live in Lovelock. I am acquainted with the plaintiff, Mr. J. B. Daniel. I knew him in July, 1919. I saw him on or about the 29th day of July, 1919. I recall having heard of an accident that was supposed to have happened to Mr. Daniel. I saw him shortly after the accident. As near as I can remember, it was the next evening at his home. He was out in his garden. Sometime later than that, I went to the theater and sat by Mr. and Mrs. Daniel. My niece, Mrs. R. H. Beale was with me.

(Testimony of Mrs. Warren B. Flick.)

I remember the night we were in the theater that Mrs. Daniels told me they were going to Lake Tahoe shortly after that. I sat by Mr. Daniel. He was on the other side of Mrs. Daniel. Mr. Daniel was on one side; next sat Mrs. Daniel; next myself, and my niece on the other side of me. Mrs. Beale was introduced to Mr. Daniel that night across me. She was sitting on one side of me and Mrs. Daniel was sitting on the other side of me, and Mr. Daniel on the opposite side of Mrs. Daniel. That was sometime before they took their trip to Lake Tahoe.

On cross-examination, Mrs. Flick testified as follows:

I saw Mr. Daniel in his garden; just observed him; I said nothing to him. The garden is a small little garden, a few beds of flowers or something growing there. We were in the yard and he was standing over in his garden. Mr. Daniels was on one end of the four, and my niece was on the other end, while we were in the theater. [120]

Thereupon, Mrs. CORA F. DARRAH was called as a witness on behalf of defendant, and having been previously sworn, testified as follows:

Testimony of Mrs. Cora F. Darrah, for Defendant.

Mrs. DARRAH.—My name is Cora F. Darrah. I am the mother of Fred Davis. I am acquainted with the plaintiff, J. B. Daniel. I have known him by sight since the early part of 1919. I was employed at Lovelock by the Utah-Nevada & Idaho

(Testimony of Mrs. Cora F. Darrah.)

Telephone Company as district manager and chief operator, and was so employed on July 28th, 1919. I saw my son on the afternoon of that day driving into town around 3 o'clock. I saw him on the street before he came to the telephone office, not to speak to him. I just saw him coming into town. I saw him back his car in front of the telephone office toward the right of the building. The telephone building, or rather the First National Bank Building, was being remodeled and there were various piles of building material in front of the office, with the exception of immediately in front of the stairway, which was to the right of the building. It was in front of that he parked his car. I didn't see Mr. Daniel that day. I saw him the following day at his home in the living-room. He was standing when I first saw him, but he sat on the divan or settee and later got up and walked across the room while I was there. Mr. Goodman was there when I first went in. I had a short conversation with Mr. Daniel about the accident. I saw Mr. Daniel again three or four days later in his car in front of the telephone office as he was driving by. There were other people in the car with him. I had occasion to ascertain that Mr. Daniel's hearing was not good. He called in from the Big Five Ranch and I repeated a few words of his conversation. It was out to Fanning station, and once he called from the telephone office to this same station, and I noticed that he repeated, or that he asked to have the conversation repeated a time or two from

(Testimony of Mrs. Cora F. Darrah.)

the party he was speaking to. He was talking from a wall telephone right next to the switch board so I was able to hear what he said.

On cross-examination, Mrs. Darrah testified as follows:

Mrs. DARRAH.—I have been district manager of the U. N. I. T. [121] Co. nine months. I found the equipment of the company first class, as good as any in the state, barring the transcontinental line of the Bell Telephone Company. I concluded that he had not heard what was said from his request to have the conversation repeated. At the particular time of the conversation, the line was in good condition. I went to visit Mr. Daniel about the accident and had a conversation with him concerning it. I had not talked to my son about it up to that time. I didn't call on Mr. Daniel at any other time in Lovelock. I saw him frequently on the street after that. I do not remember of ever having seen you, Mr. Goodman, with Mr. Daniel, excepting at his home. I have very fine hearing. I have frequently asked people to repeat messages over the telephone.

Thereupon the deposition of Miss HAZEL ZUNINI was called for by Mr. Kearney on behalf of defendant. The deposition was taken under stipulation dated April 24th, 1920, and was offered in evidence on behalf of defendant. It was stipulated by counsel for plaintiff and defendant that the second question should be read: "Do you know the plaintiff"? The deposition was then read by

(Testimony of Mrs. Cora F. Darrah.)

counsel for the defendant. Thereupon, the following took place:

Mr. SPRINGMEYER.—We offer in evidence the deposition of Millie L. Rodgers, and after that we will offer the deposition of Elizabeth A. Rodgers.

Mr. GOODMAN.—I have no objection. There may be objections to the responses to the questions. I have never seen the depositions or the answers.

The COURT.—Were your objections noted in the deposition itself?

Mr. GOODMAN.—No, your Honor. The stipulation provides that said depositions when taken shall be mailed by said Notary to the Clerk of the above-entitled court at Carson City, Nevada, and may be read in evidence by either party, subject only to objections as to competency, materiality or relevancy of the testimony set forth therein.

Deposition of Millie L. Rodgers, for Defendant.

Thereupon the deposition of MILLIE L. RODGERS was read by Mr. Springmeyer. The deposition in full is as follows: [122]

In the District Court of the United States in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Interrogatories Propounded to Millie L. Rodgers.

Interrogatories to be propounded to MILLIE L. RODGERS, defendant in the action entitled above, residing in San Francisco, California:

FIRST INTERROGATORY.

Give your name and place of residence.

SECOND INTERROGATORY.

Are you the defendant in the action entitled above?

THIRD INTERROGATORY.

Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, State of Nevada, known and described as the Reservation or Rodgers ranches and of a Ford automobile used in connection with the operation of said properties?

FOURTH INTERROGATORY.

Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory?

FIFTH INTERROGATORY.

If your answer to the fourth interrogatory is in the negative please state if you know who during the month of July, 1919, was in the possession, management or control of said ranches and automobile?

SIXTH INTERROGATORY.

If your answer to the fifth interrogatory is that the said ranches and automobile were in the possession and under the management or control of your

mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control. [123]

SEVENTH INTERROGATORY.

If your answer to the sixth interrogatory is that your mother Elizabeth A. Rodgers, was in the possession and had the management and control of said ranches and automobile, under an oral lease and agreement, please state what the terms of said oral lease and agreement were.

EIGHTH INTERROGATORY.

Who, if you know, received the profits, if any, arising from the operation of said ranches during the month of July, 1919?

NINTH INTERROGATORY.

Who, if you know, paid the operating expenses of said Reservation for Rodgers ranches for the month of July, 1919?

TENTH INTERROGATORY.

Who, if you know, paid for supplies used in the operation of said ranches and automobile during the month of July, 1919?

ELEVENTH INTERROGATORY.

Who, if you know, was in active charge of said ranches during the month of July, 1919, as the superintendent thereof?

TWELFTH INTERROGATORY.

If you know, please state who employed and paid such superintendent?

THIRTEENTH INTERROGATORY.

Have you at any time since the said ranches and

automobile came into your ownership exercised any control or management of the same either directly or through any person or persons acting as your employee or employees, agent or agents or representative or representatives?

W. M. KEARNEY,
CANTWELL & SPRINGMEYER,
Attorneys for Defendant.

**Answers to Interrogatories Propounded to Millie
L. Rogers, for Defendant.**

The following answers to the above interrogatories submitted to Millie L. Evans were given.

FIRST INTERROGATORY.

Millie L. Rodgers, corner Market and New Montgomery Streets, San Francisco, California. [124]

SECOND INTERROGATORY.

Yes.

THIRD INTERROGATORY.

Yes.

FOURTH INTERROGATORY.

No.

FIFTH INTERROGATORY.

Elizabeth A. Rodgers, my mother.

SIXTH INTERROGATORY.

Under an oral lease.

SEVENTH INTERROGATORY.

My mother leased the property from me under an agreement to operate it and pay me one-half of the annual net profits therefor.

EIGHTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

NINTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

TENTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

ELEVENTH INTERROGATORY.

W. R. McCulloch.

TWELFTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

THIRTEENTH INTERROGATORY.

Yes.

MILLIE L. RODGERS,

MILLIE R. EVANS.

Cross-Interrogatories to be propounded to Millie L.
Rodgers, the Defendant:

FIRST CROSS-INTERROGATORY.

How old are you?

SECOND CROSS-INTERROGATORY.

In what manner are you related to Mrs. Elizabeth
A. Rodgers?

THIRD CROSS-INTERROGATORY.

By whom was the Rodgers or Reservation Ranches
deeded or transferred [125] to you, and if you
did not obtain title by deed state how you acquired
title.

FOURTH CROSS-INTERROGATORY.

If you have testified that your property in Love-
lock Valley was in the year of 1919 under an oral
lease to your mother, please give the date, and place
where the lease agreement was entered into.

FIFTH CROSS-INTERROGATORY.

Did the agreement of lease include all the per-

sonal property on your ranches, and if it did not state how much it did include?

SIXTH CROSS-INTERROGATORY.

Did the lease include all of your ten thousand acres of land in Pershing County, Nevada, and if it did not include all state what part or parts it did include.

SEVENTH CROSS-INTERROGATORY.

For how many years did you make the lease?

EIGHTH CROSS-INTERROGATORY.

Have you ever managed your ranches in Lovelock Valley yourself?

NINTH CROSS-INTERROGATORY.

What if anything did your mother Mrs. Elizabeth A. Rodgers do in relation to the management of your ranches in the years of 1916, 1917, and 1918 or any one of those years?

TENTH CROSS-INTERROGATORY.

At the time of making the agreement or lease with your mother Mrs. Rodgers, state fully just what was said by each of you, and what witnesses, if any, were present?

ELEVENTH CROSS-INTERROGATORY.

What portion of the profits from your ranch operations in Lovelock Valley are shown in your income tax return for the year of 1919?

TWELFTH CROSS-INTERROGATORY.

On the 6th day of December, 1919, when you verified your answer to the original complaint in this action, were the matters you have testified to known to you?

THIRTEENTH CROSS-INTERROGATORY.

If your answer to the last cross-interrogatory was in the affirmative then state why you admitted under oath that Fred Davis was your servant, [126] in your employ, and operating the automobile in question under your direction and control in the course of his employment?

FOURTEENTH CROSS-INTERROGATORY.

Had you communicated all the matters contained in your answers to your attorneys at the time your first answer was filed?

FIFTEENTH CROSS-INTERROGATORY.

Isn't it a fact that the agreement with Mrs. Rodgers was in substance, that she would manage and take care of your property for a consideration of one-half the profits?

SIXTEENTH CROSS-INTERROGATORY.

State fully the extent of your personal experience in managing ranches, either your ranches in Lovelock Valley, or other ranches.

SEVENTEENTH CROSS-INTERROGATORY.

Have you had any other ranch properties other than the ones in question, and if so are they under lease to your mother?

EIGHTEENTH CROSS-INTERROGATORY.

You reside with your mother Mrs. Elizabeth A. Rodgers, do you not?

NINETEENTH CROSS-INTERROGATORY.

What is your San Francisco address?

TWENTIETH CROSS-INTERROGATORY.

Do you maintain, or have you ever maintained a business office, and if so when and where?

TWENTY-FIRST CROSS-INTERROGATORY.

Are you acquainted with the plaintiff in this action?

TWENTY-SECOND CROSS-INTERROGATORY.

Did you fail to mention the lease to your mother in your original answer by reason of any desire to conceal the same until such time as an action against your mother would be barred by reason of the statute of limitations fixing the time in which actions must be brought for damages arising from personal injuries?

TWENTY-THIRD CROSS-INTERROGATORY.

The properties which you claim and allege to be under lease to Elizabeth A. Rodgers, or which were under lease in July, 1919, are of the value of more than one million dollars, are they not? [127]

TWENTY-FOURTH CROSS-INTERROGATORY.

Approximately how many times were you in Lovelock or on your ranches while they were so under lease, or since they were leased if the lease is still in force?

TWENTY-FIFTH CROSS-INTERROGATORY.

Who represents or acts for you in making sales of produce or personal property from your ranches in Lovelock Valley?

TWENTY-SIXTH CROSS-INTERROGATORY.

Who acted for you in the year 1919 in the sale of fertilizer to E. A. Parkford of Los Angeles?

TWENTY-SEVENTH CROSS-INTERROGATORY.

It is a fact that your mother Mrs. Elizabeth A. Rodgers keeps all your business accounts for you, and is your adviser in all business matters?

BOOTH B. GOODMAN,
ROBERT RICHARDS,
Attorneys for Plaintiff.

Answers of MILLIE L. RODGERS to Cross-Interrogatories.

FIRST CROSS-INTERROGATORY.

Twenty-five years.

SECOND CROSS-INTERROGATORY.

I am her daughter.

THIRD CROSS-INTERROGATORY.

By deed from my mother, and from the estate of my father.

FOURTH CROSS-INTERROGATORY.

The agreement was made at San Francisco, California, in the month of March, 1919.

FIFTH CROSS-INTERROGATORY.

It included everything with the exception of some marketable products then on the ranch, such as some hay, grain and fertilizer.

SIXTH CROSS-INTERROGATORY.

Yes.

SEVENTH CROSS-INTERROGATORY.

It was to be from year to year during my mother's lifetime, unless we both decided to drop it. [128]

EIGHTH CROSS-INTERROGATORY.

No.

NINTH CROSS-INTERROGATORY.

Nothing, except to give me her views on any matter that I asked her, or do anything that I asked her to do, as a parent would, naturally.

TENTH CROSS-INTERROGATORY.

I cannot recall the exact conversation now. Many things were said back and forth about the ranch from time to time covering a considerable period, until my mother finally stated that she would lease the property and operate it herself, and give me one-half of the net profits, to which I agreed. Miss Diggs, I believe, was present when the matter was finally decided upon, or at least during much of the discussion.

ELEVENTH CROSS-INTERROGATORY.

One-half.

TWELFTH CROSS-INTERROGATORY.

Yes.

THIRTEENTH CROSS-INTERROGATORY.

I did not understand that I was admitting anything except the ownership of the ranch when I read the answer. Later, through discussion with my attorney, John E. Bennett, the error was discovered, he not fully understanding the situation at that time.

FOURTEENTH CROSS-INTERROGATORY.

No, I answered at the time what questions my attorney asked; but he did not ask me if Davis was my servant, in my employ, and operating the automobile under my direction and control in the course of his employment. My attention was not called to this particular feature when I read the answer.

I naturally signed the paper which the attorney presented to me which I thought covered the ownership of the ranch, as he knew of the deeds to me.

FIFTEENTH CROSS-INTERROGATORY.

No.

SIXTEENTH CROSS-INTERROGATORY.

I have no experience as such manager

SEVENTEENTH CROSS-INTERROGATORY.

No. [129]

EIGHTEENTH CROSS - INTERROGATORY.

Yes.

NINETEENTH CROSS - INTERROGATORY.

Corner Market and New Montgomery Streets.

TWENTIETH CROSS-INTERROGATORY.

No.

TWENTY-FIRST CROSS-INTERROGATORY.

No.

TWENTY-SECOND CROSS-INTERROGATORY.

No, I know nothing about the statute of limitations.

TWENTY-THIRD CROSS-INTERROGATORY.

I have never had them appraised nor fixed a value for them.

TWENTY-FOURTH CROSS-INTERROGATORY.

Once, I believe.

TWENTY-FIFTH CROSS-INTERROGATORY.

No one. The ranch is leased.

TWENTY-SIXTH CROSS-INTERROGATORY.

I do not remember when this fertilizer was sold; but if it was sold after March, 1919 it was probably

sold by my mother as part of the salable products reserved from the lease. If sold prior to that time it was sold by the ranch superintendent.

TWENTY-SEVENTH CROSS-INTERROGATORY.

No.

MILLIE L. RODGERS,
MILLIE R. EVANS.

No objections were raised by plaintiff's attorney until the reading of the Fourth Interrogatory:

Fourth Interrogatory: Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory?

A. No.

Mr. GOODMAN.—That is objected to as a conclusion.

(Discussion.)

The COURT.—I think that called for a conclusion. The question did in the first place; and certainly the answer is a conclusion.

Mr. SPRINGMEYER.—We will take an exception to the ruling of the Court on the ground the question is proper. [130]

The COURT.—On the ground that the question is proper?

Mr. SPRINGMEYER.—Yes, may it please the Court.

The COURT.—Very well, if you put it on that ground I have no hesitation at all.

Mr. SPRINGMEYER.—And that it is material to the issues raised in the case.

The COURT.—It is a mere conclusion. You may go on. I think the particular instruction to the jury will be that they are to determine that fact from the evidence and not from any conclusion as to law or fact that is given by a witness. That is the very question for them to determine after they have considered the testimony; and it is a conclusion which should be determined from the evidence that is offered.

Mr. SPRINGMEYER.—(Reading:) Fifth Interrogatory. If your answer to the fourth interrogatory is in the negative, please state, if you know, who during the month of July, 1919 was in the possession, management or control of said ranches and automobile.

The COURT:—That is the same thing, Mr. Springmeyer, and the same exception.

Mr. SPRINGMEYER.—(Reading:) If your answer to the fifth interrogatory is that the said ranches and automobile were in your possession and under the management or control of your mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control.

Mr. GOODMAN.—We make the same objection to the question.

The COURT.—I will let that stand now.

Mr. SPRINGMEYER.—(Reading:) A. Under an oral lease.

Mr. GOODMAN.—I renew my objection to the answer. What constitutes a lease, either oral or

written, is purely a question of law, and not a question of fact.

The COURT.—That depends on whether they have set out the lease or not.

Mr. SPRINGMEYER.—(Reading:) If your answer to the sixth interrogatory is that your mother, Elizabeth A. Rodgers was in the [131] possession and had the management and control of said ranches and automobile under an oral lease and agreement, please state what the terms of said oral lease and agreement were.

A. My mother leased the property from me under an agreement to operate it and pay me one-half the actual net profits therefor.

Mr. GOODMAN.—The same objection to that question on the ground the statement of the person leasing the property is really a conclusion of law.

The COURT.—Well, gentlemen, it is four o'clock and I think you had better look that deposition over and be ready in the morning to state your objections before the answers are read. I will hear your objections in the morning and after they are disposed of, the rest of the deposition may be read to the jury.

Upon reconvening on Saturday, June 4th, at 9 o'clock A. M., the following proceedings were had:

Mr. KEARNEY.—Instead of continuing with the deposition at this time, I would like to put Dr. Maclean on the stand.

Testimony of Dr. Donald Maclean, for Defendant.

Thereupon, Dr. DONALD MACLEAN was called as a witness by defendant, and after being duly sworn, testified as follows:

Dr. MACLEAN.—My name is Donald Maclean. I am practicing physician and surgeon and have so practiced for 23 years. I received my education in Edinburgh, Scotland. I took a post graduate course in Vienna and a post graduate course at the University of London; also a post graduate course in New York and a six weeks' course at the Mayo clinic in Minnesota. My practical experience in my profession constitutes service in the U. S. Army during the Spanish-American War in charge of the surgical department in the general hospital at Savannah, Georgia; in charge of the surgical ward at the Presidio General Hospital, San Francisco; chief of staff of St. Vincent Hospital, Leadville, Colorado, for several years. I have been chief medical adviser for the Nevada Industrial Commission for eight years and in general practice ever since graduation continuously for 23 years. I have performed surgical operations as well as practicing as a physician. I have had a great deal of experience in examination of X-ray plates, particularly in diagnosing cases for surgical [132] operations and bone injuries. During the last eight years as chief medical adviser for the Nevada Industrial Commission, we have had between six and seven thousand claims, a certain percentage being bone cases which

(Testimony of Dr. Donald Maclean.)

require X-ray plates submitted for our review. I have studied several hundred X-ray cases at least, for the Commission. In other cases in the performance of surgical operations, I have examined X-ray plates. I have checked up my examinations with actual operation on the patients subsequently. I have found that I have been correct in reading the X-ray plates from subsequent operations. A practicing surgeon does not rely on X-ray plates. He relies on his physical findings and merely uses X-ray plates to check up. Physical science of a fracture or injury to a bone is usually very very definite, and it is only in those cases in which there is any doubt that a man relies on the X-ray plates. An X-ray plate can be made to show, well, almost anything, depending upon the angle at which the picture is taken. An X-ray plate represents a shadow on the bone. It is not an actual picture such as is taken in ordinary photography. It is a shadow—a picture of a shadow. The X-ray does not penetrate bone, but penetrates the soft tissue. The plate is placed behind, and the light is transmitted through, and the consequence is, the plate shows nothing but the shadow of the bone. In other words, the bony portion is not shown upon the plate. The distance of the bone from the plate and the distance of the ray from the bone make a vast difference as to the definiteness with which the shadow is shown. I do not think I looked at any of the pictures in evidence here, only the films. The pictures of a plate are not ever very definite.

(Testimony of Dr. Donald Maclean.)

I examined Plaintiff's Exhibit No. 5. It represents the hip joint, a small portion of the shaft of the femur. I made a careful examination of it. I cannot find any thing wrong with it. It seems to be a perfectly normal hip joint and pelvic bone, as far as shown. I examined it with reference to the lower border of the pubis. The descending ramus shows a slight roughening. That does not indicate anything very much. You might find that in a picture of the descending ramus of the pubis or the pelvic bone of almost any man past middle life. It represents nothing out of the ordinary in a man past [133] seventy years. I would say it represented a perfectly normal condition and will cause no inconvenience of a man of seventy-three years of age or any other person. I examined plaintiff's Exhibit No. 7 and 8. They represent the same thing as number 6 on the other side. There are no irregularities whatever, and nothing abnormal is shown on them. It represents a perfectly normal hip joint in my opinion, after a very careful examination. I examined plaintiff's Exhibit No. 9. It represents a picture of the lower dorsal lumbar spine and the pelvic bones at the junction,—at the back junction with the spine. I cannot see anything abnormal among the vertebrae in this picture. I would like to say in regard to that that it is the opinion of X-ray experts and industrial commission surgeons throughout the country, that thorough definite pictures of the lumbar spine cannot be taken; the lower lumbar spine in ninety per cent

(Testimony of Dr. Donald Maclean.)

of all men are not the same. They do not agree. they are an anomaly in nearly all men in the lower lumbar spine; and to get a picture of it in the position in which it lies, is almost impossible; a definite picture, but as near as you can see from that picture, the lumbar spine is normal. It appears to be a normal lumbar spine, but it would appear that when the picture had been taken, the light had been transmitted a little to one side. The spinous processes should lie square in the middle, and these are a little to the right, the light being transmitted through the bodies of the vertebrae and the spinous processes. The fact that the spinous processes show a little to one side, instead of exactly in the middle of the column, would lead one to think that the X-ray tube, the center of the X-ray tube, has been slightly to the left, transmitting indirectly, rather than directly through the body of the vertebrae. This would produce the representation that is shown upon that film. There is always a lateral curvature in every normal man who reaches adult life. In the right hand man, the curvature is to the right, the vertebrae lean to the right in the muscular play, and in the left handed man, the upper dorsal vertebrae lean to the left; and in order to balance that, there is always lower down a slight curvature in the lower part of the spine; there is a big curvature in your spine backwards in order [134] to make space for the heart, lungs and abdominal organs. There is a big curvature backward like that, the cavity being forward. That is balanced lower

(Testimony of Dr. Donald Maclean.)

down by convexity. The spine curves the other way so as to maintain the correct position, and in the man who reaches the adult life, there is always a certain amount of lateral curvature by reason of the muscular pull. A man who did not stand erect would unaccountably after a length of time have a lateral curvature. Any tailor will tell you that no man has equally well balanced shoulders; that one shoulder is always lower than the other; that eventually causes a curvature of the spine. A lateral curvature due to lowering of the shoulder would take years to develop. It would not develop in a few months. It keeps on getting worse and worse. I examined Plaintiff's Exhibit No. 15, an X-ray film plate. It represents the upper dorsal of the cervical vertebrae. The only abnormality is a slight exostosis, a bony outgrowth in the cervical vertebrae. It is a slight deposit of bone rather than an overgrowth. It is a condition in most people past middle life. It used to be an idea that nature for some reason or other drew calcereous matter out of the bone and deposited it where it wasn't wanted; and where we have joints in close opposition, the joints are apt to have a bony deposit thrown out there. It might be due to disease and might be due to infection. It is not abnormal in a man over seventy years of age. In my opinion, you find it in every man past middle life. I find a slight separation of the first rib on the right side in the upper part of the body. It is a very slight separation. I don't think it is a serious matter. It might give

(Testimony of Dr. Donald Maclean.)

him some neuralgic pains and at times some irritation. I am inclined to think it is of long standing, for the reason the rib end is much smaller than is usually seen. That separation could quite easily come from the habit of dropping one's shoulder. A muscular condition could produce it very readily. I examined Plaintiff's Exhibit No. 11, an X-ray plate. That represents the first lumbar and the lower dorsal vertebrae. It shows nothing abnormal. I examined Plaintiff's Exhibit No 17. It represents the right shoulder joint. It is a very normal shoulder [135] joint, particularly of a man over seventy years. There is no abnormal bony deposit there, unless one could say that perhaps that little point which is really a coranoid process of the scapula, which seems to be bigger than it should be. There is absolutely nothing that would cause uneasiness or physical debility of any kind. I made an examination of all the plates prior to the present time. I examined Plaintiff's Exhibit No. 19. It is a lateral view of the cervical or neck vertebrae and the base of the skull and jaw, upper cervical vertebrae. I cannot see anything abnormal or out of the way with it. There is not anything that would cause limitation of the movement of the head shown in it. There is no exostosis shown in that picture, unless it may be a slight increase in the spinous processes of the second or axis vertebrae. You would expect a certain amount of thickening, such as that in a man seventy years of age. It is natural in all men past fifty years of age. Exosto-

(Testimony of Dr. Donald Maclean.)

sis is almost entirely joined tissue; that is why old people have stiff joints. It is a natural condition. That picture shows absolutely nothing abnormal in a man over the age of seventy years. In a person over sixty years of age, the bones become more brittle, and they usually become somewhat smaller. They atrophy. The joints at the end become thickened, somewhat enlarged by the deposit of the tissue which eventually becomes bone. In taking an X-ray picture, a slight movement of the body makes a very great difference in the shadow that is produced. If the body is slightly twisted, an X-ray picture will not produce the same picture as if the body were not twisted. The trapezius muscle has no connection with the lower vertebrae of the spine. From my examination of the X-ray pictures and plates, I found nothing that would lead to atrophy of the trapezius muscle. Atrophy of a muscle is either due to its being turned from its base and its blood supply cut off, or injury to its nerve. It is not supplied by the spinal nerve, but by the spinal accessory nerve. An injury to the trapezius muscle would not necessarily cause a curvature of the spine. In carrying your body with a low shoulder, a curvature would be produced undoubtedly. If the trapezius muscle from any reason was injured or atrophied to allow the shoulder girdle to drop, it would be [136] very natural to pull the spinal cord to that side a little bit.

(Testimony of Dr. Donald Maclean.)

Thereupon Dr. Donald Maclean testified on cross-examination by Mr. GOODMAN, as follows:

I have not read Rose's work on surgery, I have heard of it. I do not make a specialty of radiology. My experience with radiology has been largely as the chief medical adviser for the Industrial Commission for eight years. We take the pictures and have them taken. We have an X-ray machine available here at Carson City. In taking pictures we place the patient on the table in a natural position, placing the ray directly over the bone and when a picture is taken that way it is usually reliable provided your plates are not defective and your machine is correct. I would consider a picture of that kind, correctly taken, a reliable photograph. I would not consider it more reliable than a physical diagnosis. Its reliability as to the bone condition depends a great deal upon what the bone condition is you are trying to find. Frequently you can take a picture with an X-ray of a broken bone, fractured clear through, and it will not show the fracture, depending upon the angle of the fracture. That is the reason X-ray fractures are taken always at two or three angles if possible because one angle will not show what you want to get. There may be a fracture and if the two parts overlap, you cannot detect it. It is usually necessary to make a physical examination of a patient to properly interpret X-ray pictures. I would as a physician and surgeon not merely take X-ray plates but use a physical examination. The

(Testimony of Dr. Donald Maclean.)

physical condition of men of the same age undoubtedly differs very greatly. Some men at forty are older than other men of seventy. In answering my questions as to a man over the age of seventy years I am assuming the average man. The average man does not live more than fifty-eight years, I believe. A man seventy years is undoubtedly pretty well debilitated anyway. You will not find abnormal conditions in all men of that age. Those conditions I mentioned may exist in a man of that age from natural causes, not that they exist in every instance. I do not want you to understand that they could not be produced by injury even though he [137] were over seventy years of age, some of these conditions could be produced by injury.

The roughening of the bones on the descending ramus of the pubis is perceptible in both pictures but more in the left. The roughening of the bone I think could be caused also from an injury if it was not caused from ordinary natural causes and when I say it is normal I am assuming it was not caused by injury but it may also have been from natural causes.

If a man's pelvis is tilted from injury, assuming that it is, and a correct picture is taken, you may get the same condition in that position which would be indicated by this picture unquestionably. The difference in those two pictures was either due to tilting of his pelvis as he lay on the table or due to

(Testimony of Dr. Donald Maclean.)

the angle the ray was placed, one or the other, and from the pictures the expert cannot tell which.

An X-ray picture is, as you have said, a shadow picture which I think makes it a little less reliable than any other photograph. A photograph of a man's face, or something of that kind, is a very definite impression of it, but this is not an impression of a bone or anything of that kind it is merely a picture shadow; and there are a good many things which make for misreading that thing. There are no other methods of taking an X-ray photograph than the shadow method. The screen method, just looking at them, is far less reliable than the other.

I have examined practically all of these pictures. They represent pretty good X-ray photography and indicate that the man who took them understood X-ray photography. I don't say that the bones of the spinal column look a little to one side. I said the spinous processes look a little to one side. You see the bodies of the vertebrae, the light goes through there (indicating), a space, little dark spaces where the light goes through. Now the light must have gone slightly to one side to go through there. It didn't all show on one side; that is, at an equal black space on each side of the spinous process. [138]

No, I could not say that that spine was out of position because your spinous processes in your body are absolutely in alignment, as far as that is concerned; they come down tick by tick in a straight line; there is nothing there to show the spine was

(Testimony of Dr. Donald Maclean.)

out of position. The spine may be tilted; it may be that he lay a little more on one side than the other, but a curvature would not throw those out of position to that extent, would not throw it to one side. The curvature might show as that shows; a curvature comes from here down that way (showing); it may be there is a slight curvature, that would be if this were thrown over to that side.

I would not say it is impossible for a violent injury to produce a condition represented there, assuming that picture was correct. It is my opinion that the light was to the right or that he lay more on one side than the other, which is the more natural thing. If he did not lie more on one side and if the light was correct and if the part had received an injury such a result might be reproduced on that plate.

The spinous processes on the right side are not very definite for some reason or other, they are very faint. The transverse process, apparently of the second lumbar, is not quite in the right position. That would not ordinarily be caused by natural conditions, but the lumbar vertebrae, as I explained to Mr. Kearney in direct examination are the hardest vertebrae in the world to take a correct picture of, and the angle at which the light goes through would be very apt to show that in that position. The transverse process is decidedly bent up. It might be possible that the process has been broken off and thrown upward. That might easily represent a fracture. It would not require a very vio-

(Testimony of Dr. Donald Maclean.)

lent blow to produce it; it depends a good deal upon the subject. It is not necessary to have a violent blow to break all the transverse processes in some people. All those films are above the average. I don't see any evidence of a fracture after again examining Exhibits 5 and 7. I don't see any evidence of a fracture in either of them. An expert cannot determine atrophy of a muscle from X-ray plates. A physical examination is necessary to determine that. X-rays penetrate a bone to a certain [139] extent. Some rays even penetrate two inches of aluminum. An injury to the shoulder destroying the circulation to the trapezius muscle might cause a drop of the shoulder. If it destroyed the circulation, it would dry and just rot away if the circulation were destroyed entirely. Destruction of the nerve is the usual cause of atrophy, resulting frequently from injury. A drop of the shoulder would not immediately cause a curvature of the spine. It would eventually cause a tilt. I do not know how long it would take, especially in an elderly man. It would take a number of years and would be gradual. The lowering of a shoulder on account of work or handling heavy things constantly over a number of years, is more likely to cause a curvature of the spine than the dropping of the shoulder from the destruction of the muscle. If you had a shoulder out of alignment from any cause, there would be compensatory curves in other parts of the body, or one side would be drawn in a little bit and the hip on that side

(Testimony of Dr. Donald Maclean.)

would be a little more prominent. Also there would be a certain curvature of the spine, probably the head would be carried to this side or might even be carried to the other side. The curvatures vary in individuals. A person may have quite a curvature of the spine and still be a perfectly normal man. A lateral curvature which involves the whole spine would not be as serious as a short displaced curvature. It is not true that normal lateral curvatures involve the whole spine. In usual lateral curvatures of habit, for instance a shoulder curvature, they involve that area to which the muscles of the shoulders are attached, and you usually have lower down, a compensatory curvature the other way. I suppose they are sometimes caused from injuries, but direct injuries, curvatures as a result of direct injuries, are usually indirect compensatory curvatures; that is, exaggeration of the normal curves are the more usual form of curvatures which you see as the result of trauma. Lateral curvatures are not very usually the result of trauma, although they may be if the force come from the right direction. The seriousness of any curvature depends a good deal on the individual and what results from it, rather than what was the cause [140] of it. It would be impossible to state without an examination of the patient what the result of any curvature would be. It is true that the spinal cord may be interfered with by pressure or something else. Pressure will cause atrophy of the nerves. Atrophy of the nerve would cause atrophy of the parts

(Testimony of Dr. Donald Maclean.)

supplied by that nerve. If it control the nerves of the legs or the function of the legs, it might interfere with the patient's ability to walk. Exhibit No. 15 shows a lateral curvature of moderate degree. One must know the history of a case, and make a physical examination to give the effect of a curvature. From an X-ray photograph, an expert could not testify as to the result of a curvature. He might express an opinion as to whether there was anything there to show whether it was due to trauma or not, but he would not be justified in saying definitely. I cannot see where anything that is shown on Exhibit No. 19 should interfere in any way with the movement of the head. I would have to examine the patient. One would be very doubtful. There is so much space between them above and below, apparently there is not enough exostosis or bony outgrowth to interfere in any way with the motion of the head. The spaces are not equal naturally; that is, they are not naturally equal. Any injury to the spinal column usually results seriously.

Thereupon on redirect examination by Mr. SPRINGMEYER, the witness testified:

Dr. MACLEAN.—The condition shown on these plates might result from injury and they might also result from traumatic or diseased conditions or from over exercise of the muscles on one side of the body, such as a right handed man developing a lateral curvature of the spine. Any one of those conditions shown might be due to any one of those

things. Habit, traumatic or diseased conditions or to over exercise of the muscles from one side or the other.

On recross-examination, the witness testified:

Dr. MACLEAN.—My opinion is based upon the X-ray photographs. You could not tell what caused the conditions, but I probably could from X-ray photographs and physical examination and a knowledge of the history of the patient. [141]

Thereupon the deposition of MILLIE L. RODGERS was offered in evidence on behalf of the defendant.

Mr. SPRINGMEYER.—May we now begin at the first interrogatory again without reading the formal parts?

The COURT.—Yes.

Mr. GOODMAN.—The Court desires the objection made to each question?

The COURT.—Yes, I think you had better.

Mr. SPRINGMEYER.—(Reading:) Third Interrogatory. Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, Nevada, known and described as the Reservation or Rodgers Ranches, and of a Ford automobile used in connection with the operation of said properties?

Mr. GOODMAN.—That is objected to as calling for a conclusion and being incompetent as a conclusion of law.

Mr. SPRINGMEYER.—We submit the question

is proper, because while it does call for a conclusion, it is an ultimate fact.

The COURT.—I will sustain the objection.

Mr. SPRINGMEYER.—We take an exception on the ground the question is proper as calling for a fact. (Reading:) Fourth Interrogatory. Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory?

Mr. GOODMAN.—Same objection, your Honor, on the ground that possession of the land and control are conclusions only, and that the question calls for a conclusion, a legal conclusion.

The COURT.—Well, it was a leading question. I think it is objectionable.

Mr. SPRINGMEYER.—We except on the same grounds. (Reads:) Fifth Interrogatory. If your answer to the fourth interrogatory is in the negative, please state, if you know, who during the month of July, 1919, was in possession, management or control of said ranches and automobile?

Mr. GOODMAN.—Exactly the same objection there. The question is even more objectionable and the same objection would apply. It [142] is a conclusion as to who was in possession, management and control; three legal conclusions embraced in that question.

The COURT.—The same ruling and exception.

Mr. SPRINGMEYER.—(Reading:) Sixth Interrogatory. If your answer to the fifth interrogatory is that the said ranches and automobile

were in the possession and under the management or control of your mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control.

Mr. GOODMAN.—We object to the question on the ground that it calls for a conclusion of law and defining the sort of an agreement or lease. The existence of an agreement or lease is a conclusion which must be arrived at from a knowledge of the facts and the circumstances which go to make up the agreement; and on the further ground that there is not now the foundation for that question. In other words, it assumes the other question was answered and in evidence.

The COURT.—I will sustain the objection to that question.

Mr. SPRINGMEYER.—Exception on the same grounds as before. (Reads:) Seventh Interrogatory. If your answer to the sixth interrogatory is that your mother, Elizabeth A. Rodgers was in possession and had the management and control of said ranches and automobile under an oral lease and agreement, please state what the terms of said oral lease and agreement were.

Mr. SPRINGMEYER.—(Reads:) A. My mother leased the property from me under an agreement to operate it and pay me half of the actual net profits therefor.

Mr. SPRINGMEYER.—(Reads:) Who, if you know, paid the operating expenses of said Reserva-

(Testimony of Dr. Donald Maclean.)

tion or said Rodgers ranches for the month of July, 1919?

Mr. SPRINGMEYER. — (R e a d s :) A. My mother, Elizabeth A. Rodgers. Eleventh Interrogatory. Who, if you know, were in active charge of said ranches during the month of July, 1919, as the superintendent thereof? A. W. R. McCulloch.

Twelfth Interrogatory. If you know, please state who employed and paid such superintendent. A. My mother, Elizabeth A. Rodgers. [143] Thirteenth Interrogatory. Have you at any time since the said ranches and automobile came into your ownership, exercised any control or management of the same, either directly or through any person or persons acting as your employee or employees, agent or agents, or representative or representatives? A. Yes.

Mr. SPRINGMEYER.—(Reads Cross-Interrogatories and deposition of Millie L. Rodgers.) Thirteenth cross-interrogatory. If your answer to the last cross-interrogatory was in the affirmative, then state why you admitted under oath that Fred Davis was your servant in your employ and operating the automobile in question under your direction and control in the course of his employment?

A. I didn't understand that I was admitting anything except the ownership of the ranch when I read the answer. Later, through discussion with my attorney, John E. Bennett, the error was dis-

(Testimony of Dr. Donald Maclean.)
covered, he not fully understanding the situation at that time.

Mr. GOODMAN.—I object to the last part as not responsive.

The COURT.—That may go out.

Mr. SPRINGMEYER.—(Reads Fourteenth Cross-Interrogatory.) Had you communicated all the matters contained in your answer to your attorneys at the time your first answer was filed?

A. No. I answered at the time what questions my attorney asked, but he did not ask me if Davis was my servant in my employ and operating the automobile under my direction and control in the course of his employment. My attention was not called to this particular feature when I read the answer. I naturally signed the paper which the attorney presented to me which I thought covered the ownership of the ranch and he knew of the deeds to me.

**Deposition of Mrs. Elizabeth A. Rodgers, for
Defendant.**

Thereupon the deposition of Mrs. ELIZABETH A. RODGERS was offered in evidence.

Mr. SPRINGMEYER.—(Reads:) Second Interrogatory. Were you during all of the month of July, 1919, in the possession, management and control of those certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers Ranch, and Ford automobile used in con-

(Deposition of Mrs. Elizabeth A. Rodgers.)
nection with the operation of said properties?
[144]

Mr. GOODMAN.—Same objection we have noted to similar questions in the previous depositions; that the evidence is incompetent and calls for a legal conclusion.

The COURT.—The same ruling and exception.

Mr. SPRINGMEYER.—(Reading:) A. I was. Third interrogatory. Who at said time was the owner of said ranches and of said automobile?

Mr. Goodman objects. The Court sustains the objection and allows Mr. Springmeyer's exception.

Mr. SPRINGMEYER.—(Reading:) A. My daughter, Millie L. Rodgers. Fourth Interrogatory. If you have answered that you were during the month of July, 1919, in the possession, management and control of said ranches and of said automobile, and that your daughter, Millie L. Rodgers was the owner thereof, please state under what sort of lease, agreement or understanding you were so in possession, management and control. A. Under oral lease.

Mr. SPRINGMEYER.—(Reads:) If you have stated in answer to a previous interrogatory that you were in the possession, management and control of that property under an oral lease and agreement, please state the terms of that lease and agreement?

A. I leased the ranch under an agreement with my daughter, Millie L. Rodgers that I would oper-

(Deposition of Mrs. Elizabeth A. Rodgers.)

ate it, and as rent therefor, give her one-half the actual net profits.

Mr. SPRINGMEYER.—(Reads:) Who received the profits, if any, arising from the conduct of said ranches during the month of July, 1919? A. I did.

Mr. SPRINGMEYER.—(Reads:) Who, if you know, paid the operating expenses incident to the running of said ranches during said month of July, 1919? A. I did.

Mr. SPRINGMEYER.—(Reading:) Has your daughter, Millie L. Rodgers ever received any of the profits arising from the operation of said ranches or paid any part of the operating expenses thereof? A. No.

The deposition was read without further objection, and the full deposition is as follows: [145]

In the District Court of the United States in and for
the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Interrogatories Propounded to Elizabeth A.
Rodgers, for Defendant.**

Interrogatories to be propounded to ELIZABETH A. RODGERS, a witness on the part of

the defendant, in the above-entitled action, residing in San Francisco.

FIRST INTERROGATORY.

Give your name and place of residence.

SECOND INTERROGATORY.

Were you during all of the month of July, 1919, in the possession, management and control of those certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers ranch and Ford automobile used in connection with the operation of said properties?

THIRD INTERROGATORY.

Who at said time was the owner of said ranches and said automobile?

FOURTH INTERROGATORY.

If you have answered that you were during the month of July, 1919, in the possession, management and control of said ranches and of said automobile and that your daughter, Millie L. Rodgers, was the owner thereof, please state under what sort of lease, agreement or understanding you were so in possession, management and control.

FIFTH INTERROGATORY.

If you have stated in answer to a previous interrogatory that you were in the possession, management and control of that property under an oral lease and agreement, please state the terms of the lease and agreement.

SIXTH INTERROGATORY.

Who received the profits, if any, arising from the conduct of said ranches during the month of July, 1919? [146]

(Deposition of Mrs. Elizabeth A. Rodgers.)

SEVENTH INTERROGATORY.

Who, if you know, paid the operating expenses incident to the running of said ranches during said month of July, 1919?

EIGHTH INTERROGATORY.

Who, if anyone, was in the management of said ranches during said month of July, 1919?

NINTH INTERROGATORY.

Under whose orders did such superintendent so manage said ranches?

TENTH INTERROGATORY.

By whom were the wages of such employees as were employed on said ranch during the month of July, 1919, paid?

ELEVENTH INTERROGATORY.

Has your daughter, Millie L. Rodgers, ever at any time been in direct possession of said ranches or has she ever at any time exercised any management or control over said ranches, either directly or indirectly, or through an agent or agents, employee or employees, representative or representatives?

TWELFTH INTERROGATORY.

Has your daughter, Millie L. Rodgers, ever received any of the profits arising from the operation of said ranches or paid any part of the operation expenses thereof?

W. M. KEARNEY,

CANTWELL & SPRINGMEYER,

Attorneys for Defendant.

**Answers to Interrogatories Propounded to
Elizabeth A. Rodgers, for Defendant.**

The following answers to the above interrogatories submitted to ELIZABETH A. RODGERS were given:

FIRST INTERROGATORY.

Elizabeth A. Rodgers, corner Market and New Montgomery Streets, San Francisco, California.

SECOND INTERROGATORY.

I was.

THIRD INTERROGATORY.

My daughter, Millie L. Rodgers.

FOURTH INTERROGATORY.

Under oral lease. [147]

FIFTH INTERROGATORY.

I leased the ranch under an agreement with my daughter Millie L. Rodgers that I would operate it, and as rent therefor give her half the annual net profits.

SIXTH INTERROGATORY.

I did.

SEVENTH INTERROGATORY.

I did.

EIGHTH INTERROGATORY.

W. R. McCulloch.

NINTH INTERROGATORY.

Mine.

TENTH INTERROGATORY.

By the superintendent and myself.

ELEVENTH INTERROGATORY.

Yes.

TWELFTH INTERROGATORY.

I have paid her half of the net profits and I pay the operating expenses.

ELIZABETH A. RODGERS.

Cross-Interrogatories propounded to ELIZABETH A. RODGERS, a witness on behalf of the defendant:

FIRST CROSS-INTERROGATORY.

The defendant is your daughter, is she not?

SECOND CROSS-INTERROGATORY.

How many children have you?

THIRD CROSS-INTERROGATORY.

From whom did the defendant acquire the Rodgers or Reservation ranch or ranches?

FOURTH CROSS-INTERROGATORY.

Is it a fact that Millie L. Evans has never managed these properties personally or through agents, but that you have always managed them for her?

FIFTH CROSS-INTERROGATORY.

How long and during what periods of time have they been under an oral lease to you? [148]

SIXTH CROSS-INTERROGATORY.

During what period or periods of time since your daughter acquired these properties have they not been under lease to you?

SEVENTH CROSS-INTERROGATORY.

During what period when they were not under lease to you, did you take any part in the management of them, and if so what part, and to what extent?

EIGHTH CROSS-INTERROGATORY.

Is it not a fact that you have always cared for your daughter's properties and attended to her business for her?

NINTH CROSS-INTERROGATORY.

Approximately how many times have you visited these properties since January 1st, 1919, to the present date?

TENTH CROSS-INTERROGATORY.

Is it not a fact that you have kept fully informed concerning the facts in this case and read or heard read both of the answers which the defendant filed?

ELEVENTH CROSS-INTERROGATORY.

Did you counsel with the attorneys for the defendant in this case in behalf of your daughter before her answers were prepared?

TWELFTH CROSS-INTERROGATORY.

Is it not a fact that the answer as originally filed was submitted to you for approval before your daughter signed it?

THIRTEENTH CROSS-INTERROGATORY

Did you make mention of the lease or report the profits from defendant's ranches which you allege to be your portion under the terms of the lease in your income tax return or returns to the United States Government?

FOURTEENTH CROSS-INTERROGATORY.

If your answer to the thirteenth cross interrogation is in the affirmative then state what portion you reported and the year or years in which such report or reports were made?

FIFTEENTH CROSS-INTERROGATORY.

How much experience have you had in ranch management, and when and how did you become experienced? [149]

SIXTEENTH CROSS-INTERROGATORY.

Have you ever acted for the defendant in buying or selling livestock, or fertilizer from her ranches in Lovelock Valley, and if so how frequently?

SEVENTEENTH CROSS-INTERROGATORY.

Are you the active head and manager of all of your interests and businesses?

EIGHTEENTH CROSS-INTERROGATORY.

In your experience you have bought, sold, leased and dealt in a good many properties, have you not?

BOOTH B. GOODMAN,
ROBERT RICHARDS,
Attorneys for Plaintiff.

Answers of ELIZABETH A. RODGERS to Cross-Interrogatories.

FIRST CROSS-INTERROGATORY.

Yes.

SECOND CROSS-INTERROGATORY.

Three: one child by my last husband, and two by my first husband.

THIRD CROSS-INTERROGATORY.

From her father and myself.

FOURTH CROSS-INTERROGATORY.

No, it is not a fact. I have never managed them forher.

FIFTH CROSS-INTERROGATORY.

Since March, 1919.

SIXTH CROSS-INTERROGATORY.

Prior to March, 1919.

SEVENTH CROSS-INTERROGATORY.

Not in management, but in advising from time to time with the manager of the ranch.

EIGHTH CROSS-INTERROGATORY.

No.

NINTH CROSS-INTERROGATORY.

Once, I believe.

TENTH CROSS-INTERROGATORY.

I heard the facts in the case, but I do not recall whether I read or heard read the answers. [150]

ELEVENTH CROSS-INTERROGATORY.

Yes, somewhat.

TWELFTH CROSS-INTERROGATORY.

No.

THIRTEENTH CROSS-INTERROGATORY

Yes.

FOURTEENTH CROSS-INTERROGATORY.

One-half net profits since 1919.

FIFTEENTH CROSS-INTERROGATORY.

I have owned ranches and employed managers therefor since my husband died in 1902.

SIXTEENTH CROSS-INTERROGATORY.

I have several times sold some stock and products reserved from the lease.

SEVENTEENTH CROSS-INTERROGATORY.

I am the active head but not the manager.

EIGHTEENTH CROSS-INTERROGATORY.

Yes.

ELIZABETH A. RODGERS.

**Testimony of Mrs. Ada Nixon, for Plaintiff
(In Rebuttal).**

Thereupon the plaintiff called Mrs. ADA NIXON as a witness in rebuttal, who, being duly sworn, testified as follows:

Mrs. NIXON.—My name is Mrs. Ada Nixon. I am twenty-two years old and resided in Lovelock in 1919. I am acquainted with the plaintiff, J. B. Daniel. I knew him in Lovelock. I could not say I am acquainted with or know Fred Davis when I see him. I remember an occasion in July, 1919, a Mr. Daniel being run over by an automobile on Fourth Street in Lovelock. I was on Fourth Street when it happened.

Q. And did you see Mr. Daniel start across the street before it happened? A. Yes.

Mr. SPRINGMEYER.—We object to the question on the ground it is not proper rebuttal testimony. Counsel should have put that in in his case in chief if he had any witnesses to testify as to what happened there.

The COURT.—It is within the discretion of the Court, and I [151] will allow the question to be answered.

Mr. SPRINGMEYER.—We note an exception on the grounds stated in the objection.

Mr. GOODMAN.—Did you see Mr. Daniel start across the street at the time he was run over?

A. Yes.

Q. At what point did he leave the sidewalk?

(Testimony of Mrs. Ada Nixon.)

Mr. Springmeyer objects. Objection overruled and exception noted.

A. I saw him come in front of the Lovelock Mercantile Bank. He came out of one of those doors there; either the bank or the stairs.

Q. Will you come down here and look at this map, Mrs. Nixon? This is marked "Lovelock Mercantile Store"; that is marked "Stairway" and that is marked "Lovelock Mercantile Bank." Will you point out on there?

A. He came out of here; either one of these places here; either the stairs or the bank.

Mr. SPRINGMEYER.—The same objection to all these questions.

Mr. GOODMAN.—(Q.) Mrs. Nixon, didn't you observe the automobile at the time it struck Mr. Daniel, or immediately afterwards?

Mr. SPRINGMEYER.—Object to that on the ground it is not proper rebuttal evidence.

The COURT.—She can answer that yes or no.

Mr. SPRINGMEYER.—Exception on the grounds stated.

Mr. GOODMAN.—Did you see it?

A. Yes. I noticed the car as it was approaching Mr. Daniel; I cannot say whether or not the driver of the car sounded his horn.

Mr. GOODMAN.—(Q.) At the time that the automobile approached Mr. Daniel, did you observe the position of the driver or the direction he was facing?

(Testimony of Mrs. Ada Nixon.)

Mr. SPRINGMEYER.—Object to that on the ground it is not proper rebuttal evidence, a part of their case in chief, may it please the Court. Our witnesses have been excused and they are reopening [152] this, may it please the Court, and counsel should have put this witness on in the beginning if she is going to testify to anything that had happened.

Mr. GOODMAN.—Yes, your Honor, it does.

The COURT.—What statement made by Mr. Davis does it contradict?

Mr. GOODMAN.—He said that he was watching Mr. Daniel all the time; that he saw him when the car approached and saw him take hold of the fender and lamp of the car. Now of course we have produced no evidence in chief that he did see him, because we didn't have the evidence at that time for that matter, but he did produce evidence that he did see him, that he was watching him.

The COURT.—I will open the case to allow you to ask that question if that is the purpose of it.

Mr. GOODMAN.—That is the purpose of it.

The COURT.—He says he was watching Mr. Daniel all the time, and there was no testimony of Mr. Daniel's to where he was looking.

Mr. SPRINGMEYER.—We take an exception and object to it particularly upon the ground our witnesses have been excused and we have no opportunity to offer evidence in support of our case.

The COURT.—Well, in nearly every case we have rebuttal testimony, and the Court is not responsible

(Testimony of Mrs. Ada Nixon.)

if you excuse your witnesses. It is not safe in any case, and the principal witness to a transaction of this kind. You may answer that question. Simply answer whether you saw or did not see.

A. Yes.

The COURT.—You did see? A. Yes.

Mr. GOODMAN.—State then in which direction he was facing.

Mr. SPRINGMEYER objects on the same grounds. Objection overruled and exception allowed.

A. He was facing the sidewalk, the driver.

Mr. GOODMAN.—(Q.) The driver was facing the sidewalk? A. The sidewalk.

Q. When you observed the driver, how close was he to Mr. Daniel? [153]

A. Well, he was just right—just knocking Mr. Daniel over when I seen him.

Mr. GOODMAN.—That is all.

Mr. SPRINGMEYER.—I move the answer be stricken upon the ground it is not responsive to the question, and we object to the question on the further ground it is not rebuttal evidence and it was not within the limits of your Honor's permission to reopen the case.

The COURT.—Well, I think I will allow the answer to stand.

Mr. SPRINGMEYER.—We except to the ruling of the Court on the grounds stated.

Thereupon, on cross-examination by Mr. SPRINGMEYER, Mrs. Nixon testified:

(Testimony of Mrs. Ada Nixon.)

Mrs. NIXON.—I did not hear whether Mr. Davis sounded his horn. At that time I was standing by my car in front of the Lovelock Mercantile store. I was not talking to any one. I was waiting for some one for about a quarter of an hour, standing there all by myself facing the street. I was facing up street. My car was in front of the Lovelock Mercantile store facing up street. I was right there (indicating on the map). My car was facing toward the railroad toward the east. I was standing out towards the street looking down the street toward the east. I paid some attention to Mr. Davis' car. I saw Mr. Daniel just as he left the sidewalk. He came out of the door at the bank and I saw him just as he left the sidewalk, but I never noticed him any more. I was not paying any attention to Mr. Daniel. I noticed the car start. I was watching the car. There were lots of people in cars on the street; lots of people on the street and cars standing; there were no other cars going by at that time, but there were cars going by, yet not at the time the accident happened. I can't say what attention I was paying. It was two years ago. I watched the car. I haven't given it a thought since that time. I didn't give it any thought at that time. He didn't sound his horn. Well, I thought of it once in a while. It is not a fact that when this case came for trial that I thought of it for the first time. The driver was sitting at the wheel of the car and had [154] his head up towards the sidewalk. I never noticed

(Testimony of Mrs. Ada Nixon.)

Mr. Daniel after he left the sidewalk. I was noticing the car. I looked around after I saw Mr. Daniel. The boy was looking at the sidewalk and I looked over to see what he was looking at. In the first place, I saw Mr. Daniel. My car was between Mr. Daniel and me. I was facing him then. I turned around suddenly and looked up the street where the boy was. I noticed the car. I didn't notice the car was coming at the time I looked at Mr. Daniel. The car wasn't between us. I was standing by the side of the car. I was on the side of the car towards the sidewalk. No, I was standing outside of the car in the street by the car. I was standing by the wheel. The car was not between me and the sidewalk. I was facing towards the sidewalk, and saw Mr. Daniel get off the sidewalk. I then looked at the street. I didn't keep my eyes on Mr. Daniel, because I never saw anything. I saw that car start. I turned around and saw the car and I didn't see Mr. Daniel again.

**Testimony of J. B. Daniels, for Plaintiff
(In Rebuttal).**

Thereupon Mr. J. B. DANIEL was called in rebuttal, and testified as follows:

Mr. GOODMAN.—(Q.) Mr. Daniel, at the time of your accident, when the car was approaching you, I will ask you whether or not the driver sounded the horn?

A. He never sounded the horn.

(Testimony of J. B. Daniel.)

Mr. SPRINGMEYER.—Objected to on the ground it is not proper rebuttal evidence.

The COURT.—Well, he saw the car coming, didn't he? It does not seem to me to be very material anyhow. Sounding the horn would not give him any warning if he saw the car coming.

Thereupon the plaintiff rested, the defendant rested, having no further evidence to offer.

Thereupon the case was argued by counsel for the plaintiff, and a recess taken until 1:30 P. M. At 1:30 P. M. the court reconvened. [155]

Thereupon the Court stated:

The COURT.—I intimated last evening, gentlemen, that I should allow the defendant to ask some questions as to the competency of the driver, but this morning I overlooked it. That testimony may be put in now if you wish it. I do this not because I think the testimony is particularly important, but because of the allegation in the complaint which is denied in the answer. The issue was raised, but I do not regard it as an important issue, because I think if Davis was negligent and the defendant is responsible for his negligence, it is immaterial whether he was competent or incompetent, provided the negligence was the direct cause of the injury, but you may put that testimony in now, if you wish.

Mr. KEARNEY.—If the Court please, the witness we had here for the purpose of showing the competency of the driver has gone home. He was excused and we will have to continue the trial now in order to get that testimony.

(Testimony of J. B. Daniel.)

The COURT.—How long would you want to continue the trial?

Mr. KEARNEY.—I don't know that I can reach him. He has probably gone back to Lovelock. If the Court instructs the jury now, as you have indicated that it is an immaterial matter, I suppose we might as well go on without the testimony.

The COURT.—As long as I have decided to let you put that testimony in, you are entitled to have it if you want it, but the witness should not be excused until the case is over.

Mr. KEARNEY.—I think we will go on, if your Honor please. It would delay the trial and part of the argument is in and I don't know just when I could reach the witness. He is pretty busy farming and we would have to issue another subpoena for him, and rather than have the jury come back, I think we will go on.

The COURT.—Very well.

The arguments were thereupon resumed and concluded. [156]

Mr. GOODMAN.—There are no exceptions, but I would like to ask for a further instruction. May we ask that?

The COURT.—Just a moment.

Mr. KEARNEY.—I would like to save certain exceptions, and have them noted in the record. I have been unable to follow the individual numbers of the instructions offered by the defendant, from number one to twelve, to enable me to take the usual exception on the ground that each of the instruc-

tions submitted by the defendant correctly states the law applicable under the issues presented by the pleadings, and is not covered by any instructions given by the Court; so I will, in the absence of the segregation of the instructions, make it with reference to each and every of the instructions offered by the defendant, from one to twelve, inclusive.

The COURT.—Under the practice in this court, I do not think that will do, Mr. Kearney. It is almost impossible, where such a multitude of instructions are asked, and so many of them cover the same point, for me to read them all; but you have this opportunity to put your finger on any misstatement of the law; and if I have omitted anything it should be called to my attention so that I can now instruct the jury.

Mr. KEARNEY.—It has been rather difficult. I was trying to follow the instructions as you went along to see which parts were omitted. There have been some parts omitted, and additions made.

The COURT.—Do you remember any parts that have been omitted?

Mr. KEARNEY.—I could not follow the Court.

The COURT.—If there has been any special part omitted, I would be glad to give it.

Mr. KEARNEY.—With respect to the last clear chance of the plaintiff to avoid the injury; I don't think there was any instruction given with reference to the last clear chance of the plaintiff himself.

The COURT.—I will give that. Is there anything else?

Mr. KEARNEY.—To the instructions given by the Court other than those asked by the defendant, I would like the record to show an exception, as being contrary to and against the law applicable to [157] the case.

The COURT.—In what respect?

Mr. KEARNEY.—With respect to the due care and caution, particularly with respect to the due care and caution necessary on the part of the plaintiff in stepping into a street, and not going to a cross-walk. It is the instruction where he attempted to cross upon nice calculation, or an instruction to that effect.

The COURT.—I will give that one also.

Mr. KEARNEY.—Instruction number 6 I think relates to the last clear chance.

The COURT.—The rule of last clear chance applies just as much to the plaintiff as it does to the defendant. If the plaintiff had an opportunity after he found himself in a critical position, notwithstanding any carelessness on the part of Davis, if the plaintiff had then, after he discovered his condition, an opportunity to save himself, and failed to do it, he would be responsible, provided his failure was the failure to exercise that care which an ordinarily prudent person under the same circumstances would have exercised.

Now as to crossing the street. The plaintiff, or a pedestrian crossing the street is not at liberty to speculate on his chances of getting over before an oncoming automobile. If the automobile was com-

ing rapidly, and he saw it coming, and knew it was coming, and he thought, well, possibly I can get over, I will take the chances, if he is hurt he will himself be responsible, provided his conduct on that occasion is not the conduct of a man who is exercising the ordinary, reasonable prudence of the ordinary man under such circumstances. That is the test in every case, and to be applied to the conduct of both parties.

Mr. GOODMAN.—Your Honor, I suggest an instruction be given on the measure of damages, as to suffering a loss of time.

The COURT.—Have you alleged any loss of time?

Mr. GOODMAN.—Inability to follow the occupation.

The COURT.—Well, that will be considered.

Mr. GOODMAN.—And pain and suffering has not been mentioned. [158]

Whereupon at 4:30 o'clock P. M., the jury retired to consider their verdict, and returned into court at 7:35 P. M. with the following verdict:

“In the District Court of the United States, for the
District of Nevada.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff in the sum of \$2000.00.

Dated this 4th day of June, 1921.

GEO. A. CAMPBELL,
Foreman."

The judgment of the Court was thereafter and on the 22d day of July, 1921, entered, said judgment being as follows:

"In the District Court of the United States for the District of Nevada.

May Term, 1921.

Honorable E. S. FARRINGTON, Judge.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Judgment.

This cause came on regularly for trial at the May Term, 1921, of this Court, to wit, on the 1st day of June, 1921, by a jury duly impaneled and sworn to try the issue. Mr. Booth B. Goodman and Mr. Robert Richards appeared as attorneys for the plaintiff, and Mr. Wm. M. Kearney and Messrs. Cantwell and Springmeyer on behalf of the defendant. And the jury having heard the testimony offered by the plaintiff and defendant and the in-

structions given by the Court, returned their verdict in favor of the plaintiff for the sum of Two Thousand (\$2,000.00) Dollars, and so they all say. [159]

It is, therefore, considered and ordered that the plaintiff have and recover of and from the defendant, Millie L. Evans, the sum of Two Thousand (\$2,000.00) Dollars with interest thereon at 7% per annum from this date until paid, together with his taxable cost incurred herein amounting to the sum of \$11.50.

Dated and entered July 22, 1921.

Attest:

E. O. PATTERSON,
Clerk.

Upon motion of defendant and upon stipulation of counsel orders were entered by the Court allowing the defendant — days within which a motion for a new trial could be made and entered. And thereupon within the time allowed, and on the 8th day of June, 1921, defendant moved for a new trial, said motion being as follows, to wit:

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Notice of Intention to Move for a New Trial.

To the plaintiff above named and to his attorneys,
Booth B. Goodman, Esq., and Robert Richards,
Esq.:

You and each of you will please take notice that the defendant, Millie L. Evans, whose true name is Millie L. Jones, intends to move the Court for an order to vacate and set aside the verdict of the jury and the judgment of the Court rendered thereon in the case entitled above, and to grant a new trial of said cause upon the following grounds and reasons, to wit:

1. Newly discovered evidence material for the defendant which she could not with reasonable diligence have discovered and produced at the trial.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the verdict of the jury, and that the verdict of the jury is against law. [160]

4. Errors in law occurring at the trial and duly excepted to by the defendant.

Said motion will be made and based upon affidavits hereafter to be filed and served and upon the minutes of the Court including all the pleadings, records, files and evidence herein.

Dated June 8th, 1921.

W. M. KEARNEY,
CANTWELL & SPRINGMEYER,
Attorneys for Defendant.

That on Aug. 24th, 1921, the defendant duly filed her memorandum of errors excepted to during the trial, the said memorandum of errors being as follows, to wit:

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Memorandum of Exceptions Relied Upon on
Motion for a New Trial.**

Comes now the defendant and submits the following memorandum of errors excepted to by defendant at the trial of this cause and relied upon on motion for a new trial herein:

I.

The Court erred in admitting Plaintiff's Exhibit No. 4, the same being City Emergency Ordinance No. 5 of the City of Lovelock, over the objection and exception of defendant. Pp. 55, 56, 57 transcript.

II.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who paid for the supplies of those ranches," the ruling

of the Court having been duly excepted to by defendant. Pp. 59, 60, transcript. [161]

III.

The Court erred in striking out the evidence given on cross-examination of the witness, W. R. McCullough, as to by whom he was employed, the ruling of the Court having been duly excepted to by defendant. P. 60, transcript.

IV.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Well, more directly then, for whom was he working, if you know," to which ruling defendant duly excepted. P. 60, transcript.

V.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "In whose employ, if you know, was Fred Davis on the date this accident occurred," to which ruling defendant duly excepted. Transcript, p. 61.

VI.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who operated, managed or controlled the Rodgers or Reservation Ranches in July, 1919," to which ruling defendant duly excepted. Transcript, p. 62.

VII.

The Court erred in overruling defendant's ob-

jection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "And did you make any physical examination of him," to which ruling defendant duly excepted. Transcript, pp. 64, 65.

VIII.

The Court erred in overruling defendant's objections to Plaintiff's Exhibits Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, to which ruling defendant duly excepted. Transcript, pp. 66-71.
[162]

IX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Do the X-ray photographs, or any of them, in your opinion derived from an examination and study you have made of them, show any unnatural conditions which may be the result of injury," to which ruling defendant duly excepted. Transcript, p. 73.

X.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, I will hand you the negatives and the prints, and will ask you if you will take the negative or print and show the jury the photographs and the things which you mention as evidence of injury," to which ruling defendant duly excepted. Transcript, pp. 73, 74, 77.

XI.

The Court erred in overruling defendant's objection to plaintiff's questions on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Q. Did you find from your examination of Mr. Daniel any other unnatural conditions? A. I did. Q. What were they," to which ruling defendant duly excepted. Transcript, p. 81.

XII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, assuming that a man is crossing the street and is run over by a Ford car, the wheels passing over his body, and from left to right, approximately in this direction (showing); and assuming that the man before being run over was struck by the front of the car and thrown a distance of eight feet, in your opinion would it be possible for an injury of that character to produce the conditions you have testified to," to which ruling defendant duly excepted. Transcript, pp. 82, 83. [163]

XIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as follows: "Can you remember and can you state what his physical condition and the condition of his spine was at the time that you treated him at Antioch," to which ruling defendant duly excepted. Transcript, pp. 107, 108.

XIV.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as follows: "Did you at that time in Antioch doctor Mr. Daniel to correct any of the irregularities which you found to exist," to which ruling defendant duly excepted. Transcript, p. 110.

XV.

The Court erred in overruling defendant's objection to plaintiff's permitting the witness, Dr. William F. Crawford, to use plaintiff as a subject for illustration, to which ruling defendant duly excepted. Transcript, p. 110.

XVI.

The Court erred in overruling defendant's objection to the introduction in evidence of the original complaint and the original answer, to which ruling defendant duly excepted. Transcript, pp. 132, 133.

XVII.

The Court erred in overruling defendant's motion for a nonsuit to which ruling defendant duly excepted. Transcript, pp. 133, 134.

XVIII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, W. R. McCullough, as follows: "You have already testified that Mrs Elizabeth A. Rodgers gave you instructions as to the operations and management of the Rodgers Reservation

Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada," [164] to which ruling defendant duly excepted. Transcript, pp. 152, 153.

XIX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "When were you first employed on the Rodgers or Reservation Ranches," to which ruling defendant duly excepted. Transcript, p. 156.

XX.

The Court erred in striking out the testimony of W. R. McCullough on direct examination that he was employed on the Rodgers or Reservation Ranches during July, 1919, the ruling being as follows: "I think I will change that ruling; and the testimony that he was employed during that month will be stricken, and you can question him as to the facts constituting his employment, and how he came into her employment," to which ruling defendant duly excepted. Transcript, pp. 156, 157, 158.

XXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "On the 15th of May, 1917, you had a conversation relative to employment on the Rodgers Ranch with a Mr. Ramsey, did you not," to which ruling defendant duly excepted. Transcript, pp. 158, 159.

XXII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you have a conversation relative to your employment on the Rodgers Ranch as superintendent with Mr. Ramsey before that date, or approximately that date," to which ruling defendant excepted. Transcript, p. 159.

XXIII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Where did you have this conversation, Mr. McCullough," to which ruling defendant duly excepted. Transcript, pp. 159, 160. [165]

XXIV.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "How did you first happen to go on the Rodgers Ranch as superintendent," to which ruling defendant duly excepted. Transcript, pp. 161, 162.

XXV.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "By whom was the offer made to you," to which ruling defendant duly excepted. Transcript, p. 162.

XXVI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination

of the witness, W. R. McCullough, as follows: "After going there did you take orders from Mr. Ramsey as to the management of the ranch," to which ruling defendant duly excepted. Transcript, p. 162.

XXVII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you see any checks previous to the first day of March, 1919, printed in form similar to the checks that are in evidence," to which ruling defendant duly excepted. Transcript, pp. 162, 163.

XXVIII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "During that time did you ever see a check which was signed by Millie L. Evans personally, drawn on the Rodgers Ranch at all," to which ruling defendant duly excepted. Transcript, p. 163.

XXIX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, [166] as follows: "Did you at any time during your entire employment on the ranch ever see a check drawn on the Rodgers Ranch similar to this, signed by the defendant, Millie L. Evans," to which ruling defendant duly excepted. Transcript, p. 163.

XXX.

The Court erred in overruling defendant's ob-

jection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And you do not know of your own knowledge, Mr. McCullough, whether or not Mrs Rodgers used any of those checks that had manager on them or not, do you," to which ruling defendant duly excepted. Transcript, p. 167.

XXXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And the Rodgers Ranch pay-roll account was kept in the bank under the same name all the time you were employed there, wasn't it, Mr. McCullough," to which ruling defendant duly excepted. Transcript, p. 168.

XXXII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory," to which ruling defendant duly excepted. Transcript, pp. 212, 213, 247.

XXXIII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fourth interrogatory is in the negative, please state if you know who during the

month of July, 1919, was in the possession, management or control of said ranches and automobile," to which ruling defendant duly excepted. Transcript, pp. 213, 247.

XXXIV.

The Court erred in sustaining plaintiff's objection to defendant's [167] question on direct examination of the witness, Millie L. Rodgers, as follows: "Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, State of Nevada, known and described as the Reservation or Rodgers Ranches and of a Ford automobile used in connection with the operation of those properties," to which ruling defendant duly excepted. Transcript, pp. 246, 247.

XXXV.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fifth interrogatory is that the said ranches and automobile were in the possession and under the management or control of your mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control," to which ruling defendant duly excepted. Transcript, pp. 247, 248.

XXXVI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness Ada Nixon, as follows: "And did

you see Mr. Daniel start across the street before it happened," to which ruling defendant duly excepted. Transcript, p. 256.

XXXVII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At what point did he leave the sidewalk," to which ruling defendant duly excepted. Transcript, pp. 256, 257.

XXXVIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "Will you come down here and look at this map, Mrs. Nixon. This is marked Lovelock Mercantile Store; that is marked stairway, and that is marked Lovelock Mercantile Bank; will you point out on there," to which ruling defendant duly excepted. Transcript, p. 257. [168]

XXXIX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "Mrs. Nixon, did you observe the automobile at the time it struck Mr. Daniel, or immediately afterwards," to which ruling defendant duly excepted. Transcript, p. 257.

XL.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At the

time that the automobile approached Mr. Daniel, did you observe the position of the driver, or the direction he was facing," to which overruling defendant duly excepted. Transcript, pp. 258, 259.

XXI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "State in which direction he was facing," to which ruling defendant duly excepted. Transcript, p. 259.

XLII.

The Court erred in denying defendant's motion to strike out the answer of the witness, Ada Nixon, as follows: "Well, he was just—right knocking Mr. Daniel over when I seen him," to which ruling defendant duly excepted. Transcript, p. 259.

XLIII.

The Court erred in refusing to strike from the record the following answer of the witness J. B. Daniel: "It was traveling all of twenty miles an hour," the defendant being duly entitled to an exception. Pp. 7-8, Transcript.

XLIV.

The Court erred in sustaining plaintiff's objection to defendant's question on the direct examination of defendant's witness W. R. McCullough, as follows: "You have already testified that Mrs. Elizabeth Rodgers gave you instructions as to the operation and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase

any supplies from the Lovelock Mercantile Company of Lovelock, [169] Nevada," to which ruling the defendant duly excepted. Transcript, pp. 152-53.

XLV.

The Court erred in striking from the record on his own motion, during the cross-examination of the witness W. R. McCullough, all of said witness' testimony as to the relation of employer and employee between said witness and Mrs. Rodgers, wherein the Court stated as follows: "His answer to the effect that he was in her employ during the month of July, unless the question will be permitted as to when he entered into that employment," to which the defendant duly excepted. Transcript, pp. 157-8.

XLVI.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness W. R. McCullough, as follows: Did you see him drive and operate the car at various times," to which the defendant duly is entitled to an exception. Transcript, pp. 139-40.

XLVII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness Elizabeth A. Rodgers, as follows: "Were you during all the month of July, 1919, in the possession, management and control of these certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers

Ranch and Ford automobile used in connection with the operation of said properties," to which ruling defendant duly excepted. Transcript, p. 251.

XLVIII.

The Court erred in refusing to give in *totidem verbis* defendant's requested instructions marked and numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, to which ruling defendant duly excepted. Transcript, pp. 267 to 287, inclusive.

W. M. KEARNEY,

CANTWELL & SPRINGMEYER,

Attorneys for Defendant. [170]

State of Nevada,

County of Washoe,—ss.

W. M. Kearney, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the action entitled above; that he has read the above and foregoing memorandum of Exceptions relied upon on motion for a new trial, and knows the contents thereof; that in his judgment the same are well taken in the law.

W. M. KEARNEY.

Subscribed and sworn to before me this 24th day of August, 1921.

[Seal]

GEORGIA NEWMAN.

That on December 3d, 1921, the aforesaid motion for a new trial was formally made in open court and argued to the Court and submitted, and that thereafter and on December 23d, 1921, the Court

overruled said motion and denied defendant a new trial, to which defendant excepted.

Thereupon defendant tenders this her bill of exceptions to the action of the Court in the various particulars therein set out, which is signed in open court, sealed and made a part of the record in this case, and the same is hereby settled, approved and allowed.

Dated this 8th day of February, 1922.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. Honorable E. S. Farrington, Judge. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. No. 2270. Bill of Exceptions. Service of Within Bill of Exceptions Admitted Jan. 28, 1922. Booth B. Goodman, Solicitor for Plaintiff. Filed January 28th, 1922. E. O. Patterson, Clerk. [171]

In the United States District Court in and for the
District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation Re Filing of Amended Complaint.

IT IS HEREBY STIPULATED AND AGREED that the plaintiff may amend and file

an amended complaint in the above-entitled action without formal notice or first obtaining an order of the above-entitled Court.

Dated this 17th day of January, 1921.

BOOTH B. GOODMAN and

ROBT. RICHARDS,

Solicitors for Plaintiff.

W. M. KEARNEY and

JOHN E. BENNETT,

Solicitors for Defendant.

[Endorsed]: No. 2270. U. S. Dist. Court, Dist. Nevada. Daniel v. Evans. Stipulation to Amend Complaint. Filed January 22, 1921. T. J. Edwards, Clerk. [172]

In the United States District Court in and for the
District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation Re Amended Answer, etc.

IT IS HEREBY STIPULATED, by and between the plaintiff and defendant in the above-entitled case, by and through their respective attorneys, that the defendant may amend her answer in the above-entitled case without formal motion or notice of motion to the Court.

It is further stipulated that the date for the hearing of said case as now set for the 24th day of February, 1921, may be vacated and that the case may be set for trial on Wednesday, February 9, 1921, at the hour of 10 o'clock A. M. subject, however, to a continuance in the event that the criminal calendar of the Court is not disposed of on that date, in which event the case may be set for a time immediately following the conclusion of the criminal cases to be tried in said court.

BOOTH B. GOODMAN and ROBT. RICHARDS,
Solicitors for Plaintiff.

W. M. KEARNEY and JOHN E. BENNETT,
Solicitors for Defendant.

Dated January 17, 1921.

· [Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation. Filed January 22, 1921. T. J. Edwards, Clerk. W. M. Kearney and John E. Bennett, Solicitors for Defendant. [173]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Order Allowing Writ of Error.

This 8th day of February, 1922, came the defendant, by her attorneys, and filed herein and presented to the Court her petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of 2500 dollars, which shall operate as a supersedeas bond.

E. S. FARRINGTON.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Allowing Writ of Error. Filed Feb. 8, 1922. E. O. Patterson, Clerk.

Service accepted Feb. 8th, 1922.

BOOTH B. GOODMAN,

Attorney for Plaintiff.

W. M. KEARNEY, Reno, Nevada,

One of the Attorneys for Defendant. [174]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Stipulation Fixing Time to Prepare and File Bill
of Exceptions.**

IT IS HEREBY STIPULATED, by and between the attorneys for the plaintiff and defendant respectively in the above-entitled action, that the defendant may have to and including the 24th day of January, A. D. 1922, within which to prepare, serve and file her bill of exceptions, her petition for allowance of a writ of error, her assignment of errors, and to take such other, further or different steps as are necessary or advisable on the perfection of a writ of error herein.

Dated: January 10th, 1922.

BOOTH B. GOODMAN,

Solicitor for Plaintiff.

W. M. KEARNEY,

Of Solicitors for Defendant.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation. Filed Jany. 12, 1922. E. O. Patterson, Clerk. W. M. Kearney, Solicitor for Defendant. [175]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Affidavit of Service of Copy of Writ of Error.

W. M. Kearney, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that on the 11th day of February, affiant served upon Booth B. Goodman, Esq., one of the attorneys for the plaintiff herein, by mailing a copy thereof to his office at Lovelock, Nevada, by registered mail, a copy of said writ of error.

W. M. KEARNEY.

Subscribed and sworn to before me this 11th day
of February, 1922.

[Seal]

GEORGIA NEWMAN,

Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: No. 2270. In the District Court of
the United States, in and for the District of Ne-
vada. J. B. Daniel, Plaintiff, vs. Millie L. Evans,
Defendant. Affidavit of Service of Copies of Writ
of Error. Filed Feb. 13th, 1922. E. O. Patterson,
Clerk. W. M. Kearney, Reno, Nevada, One of
the Attorneys for Defendant. [176]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Petition for Writ of Error.

Now comes Millie L. Evans (now Millie L. Jones), defendant herein, and says that on or about the 22d day of July, 1921, this Court entered judgment herein in favor of plaintiff and against this defendant, and that on December 24, 1921, this Court entered an order denying defendant's motion for a new trial in which judgment and proceedings had prior thereunto and subsequent thereunto in denying defendant's motion for a new trial in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in defendants behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authen-

ticated, may be sent to the said Circuit Court of Appeals.

W. M. KEARNEY and

CANTWELL and SPRINGMEYER and

JOHN E. BENNETT,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Petition for Writ of Error. Filed Jany. 24, 1922. E. O. Patterson, Clerk. Service Admitted Jan. 24, 1922. Booth B. Goodman, Attorney for Plaintiff. W. M. Kearney, Reno, Nevada, One of the Attorneys for Defendant. [177]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Staying Proceedings Pending Error
Proceedings.**

The defendant, Millie L. Evans (now Millie L. Jones), having on the 24th day of January, 1922, filed her petition for a writ of error from the verdict and judgment made and entered herein also from the order denying defendant's motion for a

new trial, to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having been duly allowed and upon stipulation that all proceedings be stayed pending the giving of said bond.

NOW THEREFORE, it is ordered that all further proceedings in this Court in said cause be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

E. S. FARRINGTON,
U. S. District Judge.

Dated February 8th, 1922.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Staying Proceedings Pending Error Proceedings. Filed Feb. 8, 1922. E. O. Patterson, Clerk. Service accepted Jan. 22, 1922. Attorney for Plaintiff. W. M. Kearney, One of the Attorneys for Defendant. [178]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Extending Time to Prepare, Serve and File
Bill of Exceptions—Dated August 24, 1921.**

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including five days after the Court rules upon the defendant's motion for a new trial herein within which to prepare, serve and file her bill of exceptions, her petition for allowance of a writ of error, and to take such other, further or different steps as are necessary or advisable on the perfection of a writ of error herein.

Dated August 24, 1921.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel vs. Millie L. Evans. Order. Filed this 24th day of August, 1921. E. O. Patterson, Clerk. W. M. Kearney and Cantwell & Springmeyer, Reno, Nevada, Attorneys for Defendant.
[179]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL;

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Extending Time to Prepare, Serve and File
Bill of Exceptions—Dated July 22, 1921.**

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including August 25th, 1921, within which to prepare, serve and file her memorandum of errors and affidavits, etc., relied on on motion for new trial, her bill of exceptions herein, her petition and specification of errors for allowance of writ of error herein, and to take such other, further or different steps as are necessary or advisable on a motion for new trial and on the perfection of a writ of error herein.

Dated July 22, 1921.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: No. 2270. In the District Court of the United States for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Extending Time. Filed July 22, 1921. E. O. Patterson, Clerk. W. M. Kearney and Cantwell & Springmeyer, Solicitors for Defendant. [180]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Extending Time to Prepare, Serve and File
Bill of Exceptions—Dated June 13, 1921.**

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including July 25, 1921, within which to prepare, serve and file her memorandum of errors and affidavits, etc., relied upon on motion for new trial, her bill of exceptions herein, her petition and specification of errors for allowance of writ of error herein, and to take such other, further or different steps as are necessary or advisable on a motion for new trial and on the perfection of a writ of error herein.

It is further ordered that all matters herein, including execution, be stayed to and including July 25, 1921.

Dated June 13, 1921.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Filed June 13, 1921. E. O. Patterson, Clerk.

W. M. Kearney and Cantwell & Springmeyer, Solicitors for Defendant. [181]

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Order Staying Execution.

The defendant herein having filed a bond in the sum of \$2,000.00 conditioned for the payment of the judgment entered in the above-entitled case and the same having been approved by the Court; upon motion of the attorneys for defendant and stipulation of plaintiff and defendant, and good cause appearing therefor, it is hereby ordered that execution on the said judgment be stayed, and the same is hereby, stayed in accordance with said stipulation until the motion for new trial, now pending herein, and the proposed appeal, be heard and decided or otherwise disposed of.

E. S. FARRINGTON,

United States District Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Staying Execution. Filed Nov. 8, 1921. E. O. Patterson, Clerk. W. M. Kearney, Solicitors for Defendant. [182]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation Staying Execution of Judgment.

IT IS HEREBY STIPULATED by and between the attorneys for the plaintiff and defendant, respectively, in the above-entitled action, that the execution on the judgment in this matter shall be stayed pending the disposal of the motion for new trial and the petition for writ of error and the proposed appeal herein upon the filing of a corporation surety company bond by the defendant in the sum of Two Thousand Dollars, conditioned for the payment of said judgment in the event that the defendant does not prevail in her motion for new trial or the proposed appeal herein.

IT IS FURTHER STIPULATED that the defendant may have ten days from date hereof within which to file the said bond of Two Thousand Dollars.

BOOTH B. GOODMAN and
ROBT. RICHARDS,

Solicitors for Plaintiff.

W. M. KEARNEY and

CANTWELL & SPRINGMEYER,

Solicitors for Defendant.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation. Filed Nov. 7, 1921. E. O. Patterson, Clerk. By O. E. Benham, Deputy. W. M. Kearney, Solicitor for Defendant. [183]

The premium charged for this bond is \$25.00
per annum.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that MILLIE L. EVANS (now Millie L. Jones) as principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the defendant in error, J. B. Daniel, in the full and just sum of \$2500.00, to be paid to said defendant, J. B. Daniel, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and

administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a District Court of the United States for the District of Nevada, in a suit depending in said court, between Millie L. Evans (now Millie L. Jones) defendant, and J. B. Daniel, plaintiff, a judgment was rendered against the said Millie L. Evans, and the said Millie L. Evans having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. B. Daniel citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, on the — day of May next. [184]

Now, the condition of the above obligation is such, that if the said Millie L. Evans (now Millie L. Jones), shall prosecute said writ of error to effect and answer all damages and costs if she fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of
EDWIN JONES. MILLIE L. EVANS.
J. P. JONES. Now MILLIE L. JONES.
FIDELITY and DEPOSIT CO. of MD.
[Seal] By EDGAR H. BENNETT,
Attorney-in-Fact.
[Seal] M. F. CARLETON,
Agent,
Approved by Sureties.
E. S. FARRINGTON,
District Judge.
Not valid unless countersigned by
P. L. NELSON,
Agent.

State of California,
City and County of San Francisco,—ss.

On the 25th day of January A. D. 1922, before me, John McCallan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Edgar H. Bennett, Attorney in Fact, and M. F. Carleton, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the attorney in fact and agent re-

spectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney in Fact and Agent respectively. [185]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year first above written.

[Seal]

JOHN McCALLAN,
Notary Public in and for the City and County of
San Francisco, State of California.

State of California,
City and County of San Francisco,—ss.

On this 25th day of January in the year One Thousand Nine Hundred and twenty-two before me, V. L. de Figueiredo, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Millie L. Evans now Millie L. Jones, known to me to be the same person whose name is subscribed to, and who executed the within instrument, and she duly acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in said City and County of San Francisco,

the day and year in this certificate first above written.

[Seal] V. L. DE FIGUEIREDO,
Notary Public, in and for the City and County of
San Francisco, State of California.

My commission expires June 26, 1922.

[Endorsed]: No. 2270. In the District Court of
the United States, in and for the District of
Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans,
Defendant. Bond. Filed Feb. 10, 1922. E. O.
Patterson, Clerk. [186]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Assignment of Errors.

Millie L. Evans (Now Millie L. Jones), the defendant in the above entitled action, filing herewith her petition praying for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court made and entered on the 22d day of July, 1921 in favor of the plaintiff and against said defendant and from the orders and proceedings had prior to the said judgment and subsequent thereto in deny-

ing defendant's motion for a new trial all to the prejudice of said defendant, now assigns as errors in said judgment, decree and rulings of the Court in said action, the following:

I.

The Court erred in admitting Plaintiff's Exhibit No. 4, the same being City Emergency Ordinance No. 5, of the City of Lovelock, Nevada, over the objection and exception of defendant. The testimony relative thereto being as follows:

"Mr. RICHARDS.—If the Court please, we desire to offer in evidence City Emergency Ordinance number 5, of the City of Lovelock, certified to under the seal of the clerk of the city.

"The COURT.—Is there any objection?

"Mr. KEARNEY.—We object to the offer, if the Court please, first upon the ground it is not within the issues of the complaint; there is no allegation in the complaint sufficient to support the offer, and it is therefore incompetent, irrelevant and immaterial. There is no issue in the complaint showing that such an ordinance was in force and effect at the date alleged in the complaint, and it therefore becomes incompetent, irrelevant and immaterial." P. 51, Transcript. [187]

II.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who paid for the supplies of those ranches," the ruling of the Court having been duly excepted to by defendant. Pp. 59, 60, Transcript.

III.

The Court erred in striking out the evidence given on cross-examination of the witness, W. R. McCullough, as to by whom he was employed, the ruling of the Court having been duly excepted to by defendant. Pp. 60, Transcript.

IV.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Well, more directly then, for whom was he working, if you know," to which ruling defendant duly excepted. P. 60, Transcript.

V.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "In whose employ if you know, was Fred Davis on the date this accident occurred," to which ruling defendant duly excepted. Transcript, p. 61.

VI.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who operated, managed or controlled the Rodgers or Reservation Ranches in July, 1919," to which ruling defendant duly excepted. Transcript, p. 62.

VII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "And did you make any physical exami-

nation of him," to which ruling defendant duly excepted. Transcript, pp. 64, 65.

VIII.

The Court erred in overruling defendant's objections to Plaintiff's [188] Exhibits Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, to which rulings defendant duly excepted. Transcript, pp. 66, 71.

IX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Do the X-ray photographs, or any of them, in your opinion, derived from an examination and study you have made of them, show any unnatural conditions which may be the result of injury," to which ruling defendant duly excepted. Transcript, p. 73.

X.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, I will hand you the negatives and the prints, and will ask you if you will take the negative or print and show the jury the photographs and the things which you mention as evidence of injury," to which ruling defendant duly excepted. Transcript, pp. 73, 74, 77.

XI.

The Court erred in overruling defendant's objection to plaintiff's questions on direct examination of the witness, Dr. William Neave Kingsbury, as

follows: "Q. Did you find from your examination of Mr. Daniel any other unnatural conditions? A. I did. Q. What were they," to which ruling defendant duly excepted. Transcript, p. 81.

XII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, assuming that a man is crossing the street and is run over by a Ford car, the wheels passing over his body, and from left to right, approximately in this direction (showing); and assuming that the man before being run over was struck by the front of the car and thrown a distance of eight feet, in your opinion would it be possible for any injury of that character to produce the conditions you have testified to," to which ruling defendant duly excepted. Transcript, pp. 82, 83. [189]

XIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as follows: "Can you remember and can you state what his physical condition and the condition of his spine was at the time that you treated him at Antioch," to which ruling defendant duly excepted. Transcript, pp. 107, 108.

XIV.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as fol-

lows: "Did you at that time in Antioch doctor Mr. Daniel to correct any of the irregularities which you found to exist," to which ruling defendant duly excepted. Transcript, p. 110.

XV.

The Court erred in overruling defendant's objection to plaintiff's permitting the witness, Dr. William F. Crawford, to use plaintiff as a subject for illustration, to which ruling defendant duly excepted. Transcript, p. 110.

XVI.

The Court erred in overruling defendant's objection to the introduction in evidence of the original complaint and the original answer, to which ruling defendant excepted.

"Mr. GOODMAN.—If the Court please, we desire to offer in evidence the original complaint in this action in connection with the original answer of the defendant herein. It is offered for the purpose of showing the admissions which the defendant has made in the verified answer to the verified complaint; and particularly the admission of the third paragraph of the complaint; and it is necessary to introduce both the complaint and the answer for the reason that the answer is: 'Third. Defendant admits the matters and things in the third paragraph of plaintiff's complaint contained.'

"Mr. SPRINGMEYER.—We object, may it please the Court, to the admission of these pleadings, on the ground that judicial admissions, which these are, are never admissible in evidence as such.

“The COURT.—I shall overrule the objection.”
Transcript, pp. 132, 133.

XVII.

The Court erred in overruling defendant’s motion for a nonsuit to which ruling defendant duly excepted. Transcript, pp. 133, 134.

XVIII.

The Court erred in sustaining plaintiff’s objection to defendant’s question on direct examination of the witness, W. R. McCullough, as follows: “You have already testified that Mrs. Elizabeth Rodgers gave you instructions to the operations and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada,” to which ruling defendant duly excepted. Transcript, pp. 152, 153.

XIX.

The Court erred in overruling defendant’s objection to plaintiff’s question on cross-examination of the witness, W. R. McCullough, as follows: “When were you first employed on the Rodgers or Reservation Ranches,” to which ruling defendant duly excepted. Transcript, p. 156.

XX.

The Court erred in striking out the testimony of W. R. McCullough on direct examination that he was employed on the Rodgers or Reservation Ranches during July, 1919, the ruling being as follows: “I think I will change that ruling; and the testimony that he was employed during that month

will be stricken, and you can question him as to the facts constituting his employment, and how he came into her employment," to which ruling defendant duly excepted. Transcript, pp. 156, 157, 158.

XXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "On the 15th of May, 1917, you had a conversation relative to employment on the Rodgers Ranch with Mr. Ramsey, did you not," to which ruling defendant duly excepted. Transcript, pp. 158, 159. [191]

XXII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you have a conversation relative to your employment on the Rodgers Ranch as superintendent with Mr. Ramsey before that date, or approximately that date," to which ruling defendant excepted. Transcript, p. 159.

XXIII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Where did you have this conversation, Mr. McCullough," to which ruling defendant duly excepted. Transcript, pp. 159, 160.

XXIV.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows:

“How did you first happen to go on the Rodgers Ranch as superintendent,” to which ruling defendant duly excepted. Transcript, pp. 161, 162.

XXV.

The Court erred in overruling defendant’s objection to plaintiff’s question on cross-examination of the witness, W. R. McCullough, as follows: “By whom was the offer made to you,” to which ruling defendant duly excepted. Transcript, p. 162.

XXVI.

The Court erred in overruling defendant’s objection to plaintiff’s question on cross-examination of the witness, W. R. McCullough, as follows: “After going there did you take orders from Mr. Ramsey as to the management of the ranch,” to which ruling defendant duly excepted. Transcript, p. 162.

XXVII.

The Court erred in overruling defendant’s objection to plaintiff’s question on cross-examination of the witness, W. R. McCullough, as follows: “Did you see any checks previous to the first day of March, 1919, printed in form similar to the checks that were in evidence,” to which ruling defendant duly excepted. Transcript, pp. 162, 163. [192]

XXVIII.

The Court erred in overruling defendant’s objection to plaintiff’s question on cross-examination the witness, W. R. McCullough, as follows: “During that time did you ever see a check which was signed by Millie L. Evans personally, drawn on the Rodgers Ranch at all,” to which ruling defendant duly excepted. Transcript, p. 163.

XXIX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you at any time during your entire employment on the ranch ever see a check drawn on the Rodgers Ranch similar to this, signed by the defendant, Millie L. Evans," to which ruling defendant duly excepted. Transcript, p. 163.

XXX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And you do not know of your own knowledge, Mr. McCullough, whether or not Mrs. Rodgers used any of those checks that had manager on them or not, do you," to which ruling defendant duly excepted. Transcript, p. 167.

XXXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And the Rodgers Ranch pay-roll account was kept in the bank under the same manner all the time you were employed there, wasn't it, Mr. McCullough," to which ruling defendant duly excepted. Transcript, p. 168.

XXXII.

The Court erred in sustaining the plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers as follows: "Were you at any time during the month of July,

1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory," to which ruling defendant duly excepted. Transcript, pp. 212, 213, 247.

XXXIII.

The Court erred in sustaining plaintiff's objection to defendant's [193] question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fourth interrogatory is in the negative, please state if you know who during the month of July, 1919, was in the possession, management or control of said ranches and automobile," to which ruling defendant duly excepted. Transcript, pp. 213, 247.

XXXIV.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, State of Nevada, known and described as the Reservation or Rodgers Ranches and of a Ford automobile used in connection with the operation of those properties," to which ruling defendant duly excepted. Transcript, pp. 246, 247.

XXXV.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fifth interrogatory is that the said ranches and automobile were in the possession and under the management or control of your

mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control," to which ruling defendant duly excepted. Transcript, pp. 247, 248.

XXXVI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "And did you see Mr. Daniel start across the street before it happened," to which ruling defendant duly excepted. Transcript, p. 256.

XXXVII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At what point did he leave the sidewalk," to which ruling defendant duly excepted. Transcript, pp. 256, 257. [194]

XXXVIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "Will you come down here and look at this map, Mrs. Nixon. This is marked Lovelock Mercantile Store; that is marked stairway, and that is marked Lovelock Mercantile Bank; will you point out on there," to which ruling defendant duly excepted. Transcript, p. 257.

XXXIX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination

of the witness, Ada Nixon, as follows: "Mrs. Nixon, did you observe the automobile at the time it struck Mr. Daniel, or immediately afterwards," to which ruling defendant duly excepted. Transcript, p. 257.

XL.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At the time that the automobile approached Mr. Daniel, did you observe the position of the driver, or the direction he was facing," to which ruling defendant duly excepted. Transcript, pp. 258, 259.

XLI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "State in which direction he was facing," to which ruling defendant duly excepted. Transcript, p. 259.

XLII.

The Court erred in denying defendant's motion to strike out the answer of the witness, Ada Nixon, as follows: "Well, he was just—right knocking Mr. Daniel over when I seen him," to which ruling defendant duly excepted. Transcript, p. 259.

XLIII.

The Court erred in refusing to strike from the record the following answer of the witness J. B. Daniel, "It was traveling all of twenty miles an hour," the defendant being duly entitled to an exception. Transcript, pp. 7, 8. [195]

XLIV.

The Court erred in sustaining plaintiff's objection to defendant's question on the direct examination of defendant's witness, W. R. McCullough, as follows: "You have already testified that Mrs. Elizabeth Rodgers gave you instructions as to the operation and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada," to which ruling the defendant duly excepted. Transcript, pp. 152-3.

XLV.

The Court erred in striking from the record on his own motion, during the cross-examination of the witness W. R. McCullough, all of said witness' testimony as to the relation of employer and employee between said witness and Mrs. Rodgers, wherein the Court stated as follows: "His answer to the effect that he was in her employ during the month of July, unless the question will be permitted as to when he entered into that employment," to which the defendant duly excepted. Transcript, pp. 157-8.

XLVI.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness W. R. McCullough, as follows: "Did you see him drive and operate the car at various times," to which the defendant duly is entitled to an exception. Transcript, pp. 139-40.

XLVII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness Elizabeth A. Rodgers, as follows: "Were you, during all of the month of July, 1919, in the possession, management and control of those certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers Ranch and Ford automobile used in connection with the operation of said properties," to which ruling defendant duly excepted. Transcript, p. 251.

[196]

XLVIII.

The Court erred in refusing to give in *totidem verbis* defendant's requested instructions marked and numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, to which ruling defendant duly excepted. Transcript, pp. 267 to 272, inclusive. Said instructions being as follows to wit:

2. "A person has a right to walk anywhere on a highway or street, and is not limited to the right to walk upon sidewalks. But such a person is bound to exercise care according to the circumstances, and is especially bound to the alert and watchful performance of the duty of all travelers on all highways to look where they are going."

3. "It is negligence for a person on foot to cross a public street ahead of a vehicle upon nice calculations of the chances of injury. Ordinary care does not impose upon him the duty to be constantly looking or listening to ascertain if automobiles are approaching, but he must look where he

is going and not walk blindly into danger. If he takes chances to escape danger, he is not exercising due care, and he can have no redress for injuries received in his mistaken effort."

4. "The driver of an automobile has the right to believe that a person on foot, when duly warned in sufficient season, will not cross his path, or attempt to do so, but if he does make such an attempt, it is the duty of the driver to do everything in his power to avert accident. If after being duly warned, the person on foot attempts to cross in front of the automobile, and if then the driver of the automobile does everything in his power to avoid a collision, the injured pedestrian cannot recover damages."

5. "You are instructed that in order for plaintiff to be entitled to recover, he must have been free from negligence which proximately contributed to the injury. Accordingly, even if you find it to be the fact that the driver of the automobile which inflicted the injury was a minor, or was negligently driving the car, yet before you can bring in a verdict for plaintiff you must find that he used ordinary care under the circumstances to escape injury. A plaintiff [197] is not entitled to recover damages for an injury which he could have avoided by the use of due care."

6. "If you believe that the plaintiff had the last clear chance or opportunity to avoid the injury to him, then your verdict should be for the defendant. Even though the driver of the automobile in the first instance was at fault, if the plaintiff had the

last clear opportunity to escape injury by the exercise of due care or proper diligence subsequent to the original act of negligence on the part of the driver and before the injury resulted, then the plaintiff cannot recover. Although the driver of an automobile may be negligent, an injured pedestrian cannot complain if his own subsequent negligence continues to the time of the injury, and was a contributing and efficient cause thereof."

7. "In order that you may find any verdict in the case for the plaintiff you must find from the evidence that at the time of the injury to the plaintiff, Fred Davis was in the employment of the defendant Millie Evans. And if you find from the evidence that at such time the said Fred Davis was the employee of Elizabeth A. Rodgers, then you must find for the defendant."

8. "If you find that the defendant is liable for damages; that the driver of the car was a minor or was guilty of the negligence which caused the injury to plaintiff, and that plaintiff was not guilty of contributory negligence and did not have the last clear chance or opportunity to avoid the injury, then it will be your duty to estimate from the evidence what plaintiff's damages are as a result of the injuries he sustained."

9. "The acts of a chauffeur or driver of an automobile within the authority of his employment, are the acts of a servant or employee."

"If you believe from a preponderance of the evidence that the defendant at the time of the acci-

dent was the master or employer of Fred Davis, who drove the automobile that caused the injury to plaintiff, and that said Fred Davis was under the direction and control of the defendant; and also believe that the injuries to plaintiff were caused by the negligent driver of the automobile, and that plaintiff himself was free from negligence that contributed to the accident and did not have the last clear chance to escape injury, then your verdict [198] should be for plaintiff."

10. "A master or employer is the person who has the control and direction of a servant or employee. A master or employer is responsible for the negligent acts of his servant or employee. Accordingly the employer of Fred Davis, the minor who drove the car at the time the plaintiff was injured, alone is responsible in damages to plaintiff for injuries sustained by plaintiff through the alleged negligence of said Fred Davis in driving the automobile over plaintiff.

"You are instructed that the ownership of the automobile or of the ranches upon which the automobile was used, does not in itself fix liability upon the owner for the accident. Although you believe from the evidence, that defendant, at the time alleged in the complaint was the owner of the Reservation or Rodgers ranches and the automobile driven by Fred Davis, if you find from the evidence Elizabeth A. Rodgers was then in possession of and had the management and control of such ranches and automobile, and that said Elizabeth A. Rodgers or her ranch superintendent had hired

said Fred Davis, and that said Elizabeth A. Rodgers had the direction and control of said Fred Davis, then you are instructing that the defendant, Millicent Rodgers, was not the employer of Fred Davis, and that the plaintiff is not entitled to a verdict in this case."

11. "It is the undisputed evidence that the driver of the automobile which injured the plaintiff was a minor under the age of sixteen years. There is a statute which provides that no person under the age of sixteen years of age shall be permitted to drive or operate any motor vehicle in any incorporated or unincorporated city or town in this state.

"Violation of the statute of this kind does not entitle plaintiff to damages in a civil suit if he himself was at fault. That is to say, if plaintiff was guilty of contributory negligence, or if he had the last clear chance to avoid the accident, then he is not entitled to damages for his injuries resulting from the collision. Moreover, even if the statute was violated by defendant, such violation of the statute must appear to be the proximate cause of the injury before plaintiff is entitled to recover. A statute may require of the owner of a car that it be equipped with certain lights; a [199] violation of that statute would impute negligence to the owner; but the mere violation of that statute does not make that negligent owner liable for injuries not caused by the lack of light on his vehicle. Similarly here, the owner employing a driver under the age of sixteen years is negligent

in so doing, but is responsible only for injuries to others of which the employment of such youthful driver is the proximate cause."

12. "The jury will bear in mind that the issues of negligence and of proximate cause are separate and distinct. To render the master liable for an injury caused by his servant, that servant must have been himself actually negligent or the master must have been negligent in employing him; and in addition to establishing the existence of such negligence, plaintiff must establish that such negligence was the proximate cause of the injury to plaintiff."

"In the present case, the undisputed evidence shows that the driver of the car was under the age of sixteen years; the statutes of this state prohibit the owners of motor vehicles from permitting any person of such age to drive such vehicles on the streets of incorporated or unincorporated cities. The act of the employer of such driver in permitting him to drive the car on the streets of a city or town is by law deemed to be negligence on the part of the employer. Hence it follows that every injury of which such negligence is the proximate cause is one for which the employer is civilly responsible. But it does not follow that such an employer is responsible for all injuries that the car may occasion to others while so driven by such an employee. A statute may, for instance, require a car to be equipped with certain lights; a violation of that statute imputes negligence to the person having control of it; but the mere violation of that

requirement of having certain lights does not in itself make the owner liable for injuries which are not caused by the absence of lights. Similarly here, the employer was in law negligent in employing a driver of the prohibited age, and is liable in damages for those injuries of which that negligence is the proximate cause. The plaintiff must establish by the evidence that the particular negligence which is imputed to the employer was in fact the [200] proximate cause of the injury sustained by the plaintiff. If the collision in which plaintiff sustained injury would have occurred had the car been driven by a person over the age of sixteen years, and hence endowed physically and matured as are persons over that age, then it may not be said to have been due to the negligence of the employer in employing a driver of the age of less than sixteen years. And if you find from the evidence, that the only negligence which may be attributed to the employer was that imputed to him by the employment of a driver of that age, then, before you may bring in a verdict for the plaintiff you must also find from the evidence that the immaturity of the driver was the proximate cause of the injury to the plaintiff."

XLIX.

The Court erred in denying defendant's motion for a new trial herein.

W. M. KEARNEY and

CANTWELL & SPRINGMEYER and

JOHN E. BENNETT,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Assignment of Errors. Filed Jany. 24, 1922. E.O. Patterson, Clerk. Service admitted Jan. 24, 1922. Booth B. Goodman, Attorney for Plaintiff. W. M. Kearney, Reno, Nevada. One of the attorneys for Defendant. [201]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Certification of Exceptions to Order of Court Re-
jecting a Portion of Defendant's Bill of Ex-
ceptions.**

In this cause I hereby certify that the defendant herein filed her bill of exceptions on the 28th day of January, 1922, within the time allowed by order made in open court, at which time the plaintiff's attorney was present, and that the settlement of said bill of exceptions came on regularly to be heard on February 8, 1922, and that the plaintiff's attorney objected to that part of said bill of exceptions containing the defendant's twelve requested instructions upon the ground that "it set forth in full twelve instructions requested by defendant, contrary to law and the rules of this court; that it is impossible

to ascertain in what respect the Court failed to instruct the jury or misinstructed the jury, and that no proper exceptions to the Court's charge to the jury were taken''; the Court sustained the said objections interposed by plaintiff's attorney, because in excepting to the instructions given by the Court to the jury, defendant's counsel failed to indicate which, if any, of the proposed twelve instructions had not been covered in the charge of the Court, and ordered the said twelve requested instructions eliminated from said bill of exceptions following page —;

And I further certify that the part of the said bill of exceptions ordered by the Court to be eliminated from said bill of exceptions, before the same was settled and allowed, are as follows, to wit:

At the close of the testimony defendant requested the Court [202] to give to the jury the following instructions:

1.

The burden is upon the plaintiff to establish his case by a preponderance of the evidence, and by a preponderance is meant that the evidence in favor of plaintiff outweighs and is more convincing than that in favor of defendant. That is to say, plaintiff must prove all the allegations in his complaint, not admitted by defendant, by more substantial and convincing evidence than that offered on the part of defendant.

2.

A person has a right to walk anywhere on a highway or street, and is not limited to the right to walk

upon sidewalks. But such a person is bound to exercise care according to the circumstances, and is especially bound to the alert and watchful performance of the duty of all travelers on all highways to look where they are going.

3.

It is negligence for a person on foot to cross a public street ahead of a vehicle upon nice calculations of the chances of injury. Ordinary care does not impose upon him the duty to be constantly looking or listening to ascertain if automobiles are approaching, but he must look where he is going and not walk blindly into danger. If he takes chances to escape danger, he is not exercising due care, and he can have no redress for injuries received in his mistaken effort.

4.

The driver of an automobile has the right to believe that a person on foot, when duly warned in sufficient season, will not cross his path, or attempt to do so, but if he does make such attempt, it is the duty of the driver to do everything in his power to avert accident. If after being duly warned, the person on foot attempts to cross in front of the automobile, and if then the driver of the automobile does everything in his power to avoid a collision, the injured pedestrian cannot recover damages.
[203]

5.

You are instructed that in order for plaintiff to be entitled to recover, he must have been free from negligence which proximately contributed to the

injury. Accordingly, even if you find it to be the fact that the driver of the automobile which inflicted the injury was a minor, or was negligently driving the car, yet before you can bring in a verdict for plaintiff you must find that he used ordinary care under the circumstances to escape injury. A plaintiff is not entitled to recover damages for an injury which he could have avoided by the use of due care.

6.

If you believe that the plaintiff had the last clear chance or opportunity to avoid the injury to him, then your verdict should be for the defendant. Even though the driver of the automobile in the first instance was at fault, if the plaintiff had the last clear opportunity to escape injury by the exercise of due care or proper diligence subsequent to the original act of negligence on the part of the driver and before the injury resulted, then the plaintiff cannot recover. Although the driver of an automobile may be negligent, an injured pedestrian cannot complain if his own subsequent negligence continues to the time of the injury, and was a contributing and efficient cause thereof.

7.

In order that you may find any verdict in the case for the plaintiff you must find from the evidence that at the time of the injury to the plaintiff, Fred Davis was in the employment of the defendant Millie Evans. And if you find from the evidence that at such time the said Fred Davis was

the employee of Elizabeth A. Rodgers, then you must find for the defendant.

8.

If you find that the defendant is liable for damages; that the driver of the car was a minor or was guilty of the negligence which caused the injury to plaintiff, and that plaintiff was not guilty of contributory negligence and did not have the last clear chance or opportunity to avoid the injury, then it will be your duty [204] to estimate from the evidence what plaintiff's damages are as a result of the injuries he sustained.

9.

The acts of a chauffeur or driver of an automobile within the authority of his employment, are the acts of a servant or employee.

If you believe from a preponderance of the evidence that the defendant at the time of the accident was the master or employer of Fred Davis, who drove the automobile that caused the injury to plaintiff, and that said Fred Davis was under the direction and control of the defendant; and also believe that the injuries to plaintiff were caused by the negligent driving of the automobile, and that plaintiff himself was free from negligence that contributed to the accident and did not have the last clear chance to escape injury, then your verdict should be for the plaintiff.

10.

A master or employer is the person who has the control and direction of a servant or employee. A master or employer is responsible for the negligent

acts of his servant or employee. Accordingly the employer of Fred Davis, the minor who drove the car at the time the plaintiff was injured, alone is responsible in damages to plaintiff for injuries sustained by plaintiff through the alleged negligence of said Fred Davis in driving the automobile over plaintiff.

You are instructed that the ownership of the automobile of the ranches upon which the automobile was used, does not in itself fix liability upon the owner for the accident. Although you believe from the evidence, that defendant, at the time alleged in the complaint was the owner of the Reservation or Rodgers Ranches and the automobile driven by Fred Davis, if you find from the evidence Elizabeth A. Rodgers was then in possession of and had the management and control of such ranches and automobile, and that said Elizabeth A. Rodgers or her ranch superintendent had hired said Fred Davis, and that said Elizabeth A. Rodgers had the direction and control of said Fred Davis, then you are instructed that the defendant, Millicent Rodgers, was not the employer of Fred Davis, and that the plaintiff is not entitled to a verdict in this case. [205]

11.

It is the undisputed evidence that the driver of the automobile which injured the plaintiff was a minor under the age of sixteen years. There is a statute which provides that no person under the age of sixteen years of age shall be permitted to drive or operate any motor vehicle in any incorporated or unincorporated city or town in this state.

Violation of a statute of this kind does not entitle plaintiff to damages in a civil suit if he himself was at fault. That is to say, if plaintiff was guilty of contributory negligence, or if he had the last clear chance to avoid the accident, then he is not entitled to damages for his injuries resulting from the collision. Moreover, even if the statute was violated by defendant, such violation of the statute must appear to be the proximate cause of the injury before plaintiff is entitled to recovery. A statute may require of the owner of the car that it be equipped with certain lights; a violation of the statute would impute negligence to the owner; but the mere violation of that statute does not make that negligent owner liable for injuries not caused by the lack of light on his vehicle. Similarly here, the owner employing a driver under the age of sixteen years is negligent in so doing, but is responsible only for injuries to others of which the employment of such youthful driver is the proximate cause.

12.

The jury shall bear in mind that the issues of negligence and of approximate cause are separate and distinct. To render the master liable for an injury caused by his servant, that servant must have been himself actually negligent or the master must have been negligent in employing him; and in addition to establishing the existence of such negligence, plaintiff must establish that such negligence was the proximate cause of the injury to plaintiff.

In the present case, the undisputed evidence shows that the driver of the car was under the age of six-

teen years; that statutes of this state prohibit the owners of motor vehicles from permitting any person of such age to drive such vehicles on the streets of incorporated [206] or unincorporated cities. The act of the employer of such driver in permitting him to drive the car on the streets of a city or town is by law deemed to be negligence on the part of the employer. Hence it follows that every injury of which such negligence is the proximate cause is one for which the employer is civilly responsible. But it does not follow that such an employer is responsible for all injuries that the car may occasion to others while so driven by such an employee. A statute may, for instance, require a car to be equipped with certain lights; a violation of that statute imputes negligence to the person having control of it; but the mere violation of that requirement of having certain lights does not in itself make the owner liable for injuries which are not caused by the absence of lights. Similarly here, the employer was in law negligent in employing a driver of the prohibited age, and is liable in damages for those injuries of which that negligence is the proximate cause. The plaintiff must establish by the evidence that the particular negligence which is imputed to the employer was in fact the proximate cause of the injury sustained by the plaintiff. If the collision in which plaintiff sustained injury would have occurred had the car been driven by a person over the age of sixteen years, and hence endowed physically and matured as are persons over that age, then it may not be said to have been due to the negligence

of the employer in employing a driver of the age of less than sixteen years. And if you find from the evidence, that the only negligence which may be attributed to the employer was that imputed to him by the employment of a driver of that age, then, before you may bring in a verdict for the plaintiff you must also find from the evidence that the immaturity of the driver was the proximate cause of the injury to the plaintiff.

I further certify that defendant duly excepted to said order of the Court striking said requested instructions from the bill of exceptions and the exceptions taken by said defendant to said ruling of the Court are as follows: [207]

The defendant hereby excepts to the ruling and decision of the Court in disallowing that part of the bill of exceptions which set forth in full the twelve instructions requested by the defendant, in that Rule 10 of the Circuit Court of Appeals for the Ninth Circuit does not prohibit the same being set forth, but merely provides that the charge given by the Court shall not be set forth in full.

And upon the further ground that Rule 11 of the Circuit Court of Appeals for the Ninth Circuit provides that the assignment of errors shall set out in *totidem verbis* the instructions refused, and that the bill of exceptions properly contain in *totidem verbis* the instructions refused to which exception had been taken.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Certification of Exceptions to Order of Court Rejecting a Portion of Defendant's Bill of Exceptions. Filed Feb. 28, 1922. E. O. Patterson, Clerk. W. M. Kearney, Reno, Nevada, One of the Attorneys for Defendant. [208]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Exceptions of Defendant to Rulings of Court on
Settlement of Bill of Exceptions.**

The defendant hereby excepts to the ruling and decision of the Court in disallowing that part of the bill of exceptions which sets forth in full the twelve instructions requested by the defendant, in that Rule 10 of the Circuit Court of Appeals for the Ninth Circuit does not prohibit the same being set forth, but merely provides that the charge given by the Court shall not be set forth in full.

And upon the further ground that Rule 11 of the Circuit Court of Appeals for the Ninth Circuit provides that the assignment of errors shall set

out in *totidem verbis* the instructions refused, and that the bill of exceptions properly contain in *totidem verbis* the instructions refused to which exception had been taken.

W. M. KEARNEY and

CARTWELL & SPRINGMEYER,

Attorneys for Defendant.

Service hereby admitted Feb. 7th, 1922.

BOOTH B. GOODMAN,

Attorney for Plaintiff.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Exceptions of Defendant to Rulings of Court on Settlement of Bill of Exceptions.. Filed February 7th, 1922. E. O. Patterson, Clerk. [209]

In the District Court of the United States, in and for the District of Nevada.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Opinion on Motion for New Trial.

BOOTH B. GOODMAN and ROBERT RICHARDS, for Plaintiff.

WILLIAM M. KEARNEY, JOHN E. BENNETT and CANTWELL & SPRINGMEYER, for Defendant.

FARRINGTON, District Judge:

It is alleged in the complaint that Fred Davis, a servant of defendant, while employed about her business and within the scope of his employment, negligently drove a Ford car, then owned by defendant, against plaintiff Daniel, and over and across his body. The accident occurred July 28, 1919, in Fourth Street in the city of Lovelock, Nevada. Davis was then about fourteen years of age, and it is alleged that he was driving at a dangerous and excessive rate of speed. An ordinance of the city of Lovelock in force at the time and place, prohibiting the driving of motor vehicles at a rate of speed greater than twelve miles per hour.

In her original answer, verified by herself, defendant admitted that she was "then and there the owner of a certain Ford automobile, which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant and in possession of said automobile as the servant of defendant, and driving and operating the same under defendant's direction and control and in the course of his employment." In her answer to the amended com-

plaint defendant admitted that she was the owner of the Ford automobile, but denied that Fred Davis was her servant or in her employ at the time of the accident, and averred that [210] Davis was at the time driving and operating the car as an employee of defendant's mother, Elizabeth A. Rodgers, who was then in possession and control of the car and of the Reservation or Rodgers ranches under an oral lease from defendant, whereby Elizabeth A. Rodgers had the possession, control and operation of said ranches and automobile, paying defendant as rental therefor one-half of the annual net proceeds. She also alleged that Davis was driving the car with reasonable care when Daniel recklessly and without any care, walked diagonally across the street in the middle of the block in such a manner that Davis could not in the exercise of reasonable care prevent the auto colliding with plaintiff, and that plaintiff had the last clear chance to escape said collision, and that he sustained very minor injuries.

The street where the accident occurred was about 60 feet in width. In his direct testimony Daniel stated that he looked up and down the street before he attempted to cross, and saw three cars parked, but none moving; when he reached the middle of the street he again looked, and saw a car approaching him, thinking that it would pass behind him, he hurried on a few steps further; he looked again, and saw the car coming directly toward him; he jumped, was hit by the car, knocked down, and the car ran over his body, stopping at a point where the forward end of the car was about 80 feet distant from

where his body lay. He testified also that the car was approaching him at a speed of about 20 miles an hour.

There was a trial, resulting in a verdict in favor of the plaintiff for \$2,000. The case now comes up on motion for new trial. Defendant's memorandum of exceptions contains 48 items.

EXCEPTION No. 1.

The objection that Emergency Ordinance No. 5 of the city of Lovelock was inadmissible because it was not set out in the complaint, and there was no allegation that the ordinance was in force at the time the accident occurred, is without merit. It is charged that defendant's servant was driving at an unreasonable, dangerous and excessive rate of speed. The action was not brought to collect a penalty for the violation of the ordinance. The ordinance was not the basis of the action. It was merely evidence offered in support of [211] plaintiff's allegation of negligence. Under our practice it is not essential that evidence should be pleaded, consequently the ordinance was admissible without being set up in the complaint, or even being referred to as provided in section 5072 of the Revised Laws of Nevada.

Brasington vs. South Bound R. R. Co., 89 Am. St. Rep. 905-8;

Opitz vs. Schenck, 174. Pac. 40;

Cragg vs. Los Angeles Trust Co., 98 Pac. 1063, 1066;

Jaquith vs. Worden, 40 L. R. A. (N. S.), 827, 831;

Huddy on Automobiles (5 ed.), Sec. 302;
Caughlin vs. Campbell-Sell Baking Co., 8 L. R.
A. (N. S.) 1001, 1004;
Santina vs. Tomlinson, 171 Pac. 437, 438;
Omaha Street Ry. vs. Larson, 70 Nebr. 391;
Faber vs. St. Paul Ry. Co., 29 Minn., 465, 467;
Scraggs vs. Sallee, 140 Pac. 706, 710.

EXCEPTIONS 2, 3, 4, 5 and 6.

The testimony of the witness McCullough as to who employed him as superintendent of the Rodgers ranches, who paid his salary, who paid for the ranch supplies, and for whom Davis was working under his supervision as superintendent, was excluded on the ground that it was not proper cross-examination, but was part of the defense. (Trans. pp. 59-62.)

If it be conceded that this ruling was erroneous, nevertheless it was harmless, because the same testimony was given by the same witness, and admitted as a part of the defendant's case. (See Trans. pp. 135-138.)

Adams vs. Farnsworth, 37 Pac. 221;
Rice vs. Rankin, 59 N. W. 660;
Bonnett vs. Glattfeldt, 11 N. E. 250;
Chesterfield Mfg. Co. vs. Leota Cotton Mills,
194 Fed. 358;
Wicker vs. Jones, Ann. Cas. 1914B, 1083, 1089;
Bachelder vs. Morgan, Ann. Cas. 1915C, 888,
892.

EXCEPTIONS 7, 8, 9, 10, 11, 12, 13, 14 and 15.

Under plaintiff's allegations of permanent injury, oral testimony, X-ray plates and prints show-

ing his condition at the time of the trial, were properly admitted in connection with subsequent evidence tending to show the conditions so disclosed were due to the accident.

EXCEPTION 16.

It is urged that the Court erred in overruling defendant's objection to the introduction in evidence of the original complaint and original answer. (Trans. pp. 132-133.) This objection, also, is without merit. Though the original answer was superseded by the [212] second answer, and was no longer effective as a pleading, it still operated as an admission on the part of defendant, and as such was properly admitted.

Kilpatrick-Koch Dry-Goods Co. vs. Box, 45
Pac. 629, 631;

In re O'Connor's Estate, 50 Pac. 4, 5;

Johnson vs. Sheridan Lumber Co., 93 Pac. 470,
473;

Meek vs. Deal, 124 Pac. 160, 161;

Reemsnyder vs. Reemsnyder, 89 Pac. 1014,
1015;

Watt vs. Missouri K. & T. Ry. Co. 108 Pac.
811, 812;

Scoville vs. Brock, 118 Am. St. Rep., 975, 978;

Arnd vs. Aylesworth, 29 L. R. A. (N. S.) 638,
642.

EXCEPTION 17.

At the close of plaintiff's case defendant moved the Court to direct the jury to return a verdict in her favor. The motion was overruled. Even if the excluded testimony of McCullough, referred to in

Exceptions 2, 3, 4, 5 and 6, tending, as it did, to show that Davis was not in Mrs. Evans' employ, had been admitted, still there was Mrs. Evans' admission to the contrary in her original answer, verified by herself. There was also evidence that Davis was driving at a high rate of speed, and that his negligence directly caused the injury to Mr. Daniel. Daniel's own testimony shows that he looked before attempting to cross the street, and saw three cars parked, but none in motion; he looked again when he was half way across the street, and then saw the car approaching; believing that it would pass to his rear, he hurried on; a few steps further he looked again. Thus on each of the issues raised in the pleadings there was substantially evidence in favor of plaintiff, hence it was the duty of the Court to submit them to the jury. No authority has been cited for the proposition that unless the preponderance of evidence was in favor of plaintiff the motion for an instructed verdict should have prevailed.

"If," says the Circuit Court of Appeals in *Rochford vs. Pennsylvania Co.*, 174 Fed., 81, 84, "a plaintiff has produced material evidence sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence will authorize the judge to take the question of its effect and weight from the jury."

The Circuit Court of Appeals for this circuit has declared that in order to warrant a directed verdict the case on the testimony must be clear and indis-

putable, and to which there could reasonably [213] be but one opinion.

Alaska Fish, etc. Co. vs. McMillan, 266 Fed. 26,
30;

Simpkins Federal Suit at Law, p. 123.

Finally, by offering testimony after her motion for a directed verdict was overruled, defendant waived the motion and her exception.

Wilson vs. Haley Live Stock Co., 153 U. S.
39, 43;

Simpkins Federal Suit at Law, p. 65.

EXCEPTION 18.

The question propounded was, "You have already testimony that Mrs. Elizabeth A. Rodgers gave you instructions as to the operation and management of the ranches during the month of July, 1919, pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company?" In response to a leading question the witness had already testified (Trans. p. 138) that Mrs. Rodgers gave him instructions in the control and operation of the ranches in July, 1919, but there was no evidence as to what the instructions were. The proper method would have been to show what the instructions were, what the witness did in July, 1919, and let the jury determine from the facts whether the things done were in pursuance of the instructions. Later (Trans. p. 153) the witness testified that he bought supplies in July, 1919, which were delivered to the ranch, and sent the bills O. K.'d, to Mrs. Rodgers.

EXCEPTIONS 19 to 30, Inclusive.

McCullough was allowed to testify that Mrs. Rodgers' money was paid for his services on the ranch, and also for Davis' services in driving the automobile during July, 1919 (Trans. p. 136); that they were both in her employ, and that she controlled the operations of the ranch during July, 1919 (Trans. p. 137); that he received instructions from her; that he reported to her regarding the control of the ranch, and that she gave him orders as to the management of the ranches during that month. (Trans. p. 138.)

It was evidently defendant's theory that as touching Mrs. Rodgers' control of the ranches, the employment of McCullough and Davis and the purchase of supplies, the cross-examination could thus be confined entirely to conditions, transactions and relations occurring [214] during the month in which the accident occurred. All the questions covered by exceptions 19 to 30, inclusive, were asked in an attempt to ascertain whether Mrs. Rodgers was the responsible manager of the ranches and therefore the responsible employer of Davis in July, 1919. It was proper on cross-examination to ascertain when and how McCullough and Davis were employed on the ranch (Jones on Evidence, Sec. 829); whether in drawing checks, giving orders and exercising control, Mrs. Rodgers was acting for herself, or as defendant's manager, agent, or partner (Jones on Evidence, Sec. 822). Furthermore, where the testimony in chief consists, as it did, in the interrogatories in question, of opinions and con-

clusions, great latitude is allowed in cross-examination. If defendant's theory as to restricting cross-examination, by confining questions in chief to a short period is correct, why, by confining the questions to a still shorter period, could the cross-examination not have been limited to a still shorter period, could the cross-examination not have been limited to circumstances and transactions occurring within the day, or even within the hour, when the accident occurred?

EXCEPTION 31.

This exception was taken to a question which the witness stated he was unable to answer.

EXCEPTIONS 32, 33, 34, 35 and 47.

The 34th exception relates to an attempt on the part of defendant to prove title to real estate, and to a Ford automobile in one question, to be answered by a yes or no. Though the objection was sustained, the ruling whether correct or not, was harmless, because defendant's ownership of the ranches and the automobile is alleged in the complaint, and not denied in the answer. Defendant sought in each of the interrogatories covered by the above exceptions to draw out a conclusion of the witness that Elizabeth Rodgers, and not defendant, was in the possession, management and control of the ranches and the automobile in July, 1919. The questions called for the opinion of the witness on a material issue of fact presented by the pleadings, to be decided, not by the witness, but by the jury. The ruling was correct.

Watrous vs. Morrison, 39 Am. St. Rep. 139,
145; [215]

Boyle vs. Williams, 20 N. Y. Supp. 727;

Morgan vs. Myers, 113 Pac. 153, 154.

The refusal to permit the witness to answer the interrogatory quoted in the 35th exception was without prejudice, as she was allowed to describe the lease in the following interrogatory. (Trans. p. 248.)

EXCEPTIONS 36, 37, 38, 39, 40, 41 and 42.

The allowance of the questions covered by these exceptions was in my judgment within the discretion of the Court, though a part of the testimony might more properly have been offered during the admission of plaintiff's case in chief.

1 Thompson on Trials, Sec. 346;

Abbott's Tr. Brief, Civil Jury Trials, p. 114;

Cyc. p. 1359;

Philadelphia & Trenton R. R. Co. vs. Stimson,
14 Pet. 448, 462;

Turner vs. United States, 66 Fed. 280, 284.

EXCEPTION 43.

The record does not show any exception was taken to the ruling complained of.

EXCEPTION 44.

This is the same question which was raised under exception 18.

EXCEPTION 45.

The assumption in this question is hardly correct. (Trans. p. 161.) The testimony that McCullough "was employed on the ranches, or got his employment from Mrs. Rodgers," remained in

the record and was not stricken. Furthermore, it was the purpose of the Court to lead counsel to present facts from which the jury could determine who was McCullough's employer, and considerable testimony of that tenor was subsequently given by the witness.

EXCEPTION 46.

Before the case went to the jury defendant was informed that this testimony as to the competency of Davis, would be admitted. In response, Mr. Kearney, counsel for defendant, stated that the witness subpoenaed for the purpose of showing the competency of the driver, had gone home. The Court offered to allow the case to be continued, whereupon Mr. Kearney stated, "I do not know that I can [216] reach him, he has probably gone back to Lovelock. If the Court instructs the jury now, as you have indicated, that it is an immaterial matter, I suppose we might as well go on without the testimony." (Trans. p. 265.)

EXCEPTION 48.

The exception to the instructions is not effective. It should be specific, and direct to each portion of the charge which is considered objectionable, so that the Court may make proper corrections. This was not done.

Rule 10, C. C. A., Ninth Circuit;

8 Ency. Pl. & Pr., p. 259;

Hughes Fed. Proc., p. 370, Sec. 147.

Defendant's motion for a New Trial was overruled, and she will be allowed twenty days within which to take such steps as she may be advised.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Opinion on Motion for New Trial. Filed Jany. 6th, 1922. E. O. Patterson, Clerk. [217]

In the District Court of the United States, in and
for the District of Nevada.

MINUTE ENTRY, MAY 3, 1920.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 3, 1920—Order Continuing
for Term.**

There being no answer to the call of this case, it is ordered that the same be, and is hereby, continued for the term.

MINUTE ENTRY, OCTOBER 4, 1920.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—October 4, 1920—Order Continuing
for Term.**

There being no answer to the call of this case, it

is ordered that the same be, and is hereby continued for the term.

MINUTE ENTRY, JANUARY 3, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—January 3, 1921—Order Setting Case for Trial—January 24, 1921.

The defendant's motion to dismiss coming on regularly for hearing this day, Mr. Kearney appearing for the motion; Mr. Robert Richards, appearing for Mr. Goodman, attorney for plaintiff, opposed. Mr. Richards filed an affidavit in opposition, and asked that the case be set for trial. The premises considered, it is ordered that the motion to dismiss be denied and the case is hereby set for trial by a jury on the 24th instant. [218]

MINUTE ENTRY, JANUARY 22, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—January 22, 1921—Order Vacating and Setting for Trial—February 9, 1921.

Pursuant to stipulation filed this day, it is or-

dered that the setting of this cause for the 24th instant be, and is, vacated, and that the case be reset for the 9th day of February, 1921, subject, however, to the criminal then set for trial, and if reached on that day to follow the trials of criminal matters.

MINUTE ENTRY, FEBRUARY 7, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—February 7, 1921—Order
Vacating Setting for Trial February 9, 1921.**

Upon application of Mr. Kearney, attorney for defendant, it is ordered that the setting of this cause be, and the same is hereby vacated.

MINUTE ENTRY, APRIL 4, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—April 4, 1921—Order Setting
Case for Trial May 9, 1921.**

Upon motion of Mr. R. Richards, the trial of this case is hereby set to follow the criminal cases set for May 9th next.

MINUTE ENTRY, APRIL 30, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS etc.

**Minutes of Court—April 30, 1921—Order Setting
Case for Trial May 9, 1921.**

Upon motion of Mr. Robert Richards, attorney for the plaintiff, it is ordered that the trial of this case be, and the [219] same is hereby set for May 9th next, to follow the criminal cases set for that day.

MINUTE ENTRY, MAY 12, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 12, 1921—Order Vacating
Setting for Trial May 9, 1921.**

Good and sufficient cause appearing therefor, it is ordered that the trial of this cause be, and the same is hereby, continued without date and the former setting vacated.

MINUTE ENTRY, MAY 16, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 16, 1921—Order Setting
for Trial May 23, 1921.**

Upon motion of Mr. Robert Richards, one of the attorneys for the plaintiff herein, it is ordered that the order made and entered on the 12th day of May, last, vacating the setting of this case is hereby vacated upon the grounds that the same was inadvertently made, and this case is hereby set for trial for May 23d, next at ten o'clock A. M.

MINUTE ENTRY, MAY 19, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 19, 1921—Trial Continued
to May 26, 1921.**

Good cause appearing therefor it is ordered that the trial of this case be, and the same is hereby, continued until the 26th instant at 10 A. M.

MINUTE ENTRY, MAY 23, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 23, 1921—Trial Continued
to June 1, 1921.**

Upon motion of Mr. Geo. Springmeyer, for and [220] on behalf of Mr. W. M. Kearney, attorney for the defendant herein, opposed by Mr. Robert Richards, one of the attorneys for the plaintiff; and upon the affidavit of Mr. W. M. Kearney, it is ordered that the trial of this case be, and the same is hereby, continued until Wednesday, June 1st, next, at ten o'clock A. M.

MINUTE ENTRY, JUNE 1, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of the Court—June 1, 1921—Trial.

This cause coming on regularly for trial this day, Messrs. Booth B. Goodman and Robert Richards appeared on behalf of the plaintiff; Mr. W. M. Kearney for the defendant. On motion of Mr. Kearney, it is ordered that the firm of Cantwell

& Springmeyer be entered of record as associate counsel for the defendant. Mr. Goodman made his opening statement to the jurors, and the following named were accepted by the parties and duly sworn to try the issue, to wit: Andrew W. Foote, Henry F. Best, Lawrence P. Jacobsen, Stanley G. Palmer, Arthur Noonan, D. I. Bohall, John J. Thiex, A. Belmont, William F. Powers, F. A. Hilygus, Fritz Cordes and Geo. A. Campbell. Mr. Richards read the amended complaint and Mr. Kearney his answer to said amended complaint, to the jury; and Mr. Richards also read his reply to the jury. Upon stipulation of counsel it was ordered that the official reporter, A. F. Torreyson, report these proceedings upon the usual terms. All witnesses were marshaled, sworn and placed under the rule. Stipulated by counsel that both sides might present maps of the street of Lovelock, where the accident occurred without bringing witnesses to prove them. J. B. Daniel called by plaintiff testified from map of street of Lovelock where accident occurred; a pair of torn trousers said to have been worn by plaintiff the day the accident occurred ordered admitted and marked Plff's. Ex. No. 1; two photographs of street in question identified by witness, ordered and admitted and marked Plff's. Ex. No. 2 and 3; City Ordinance No. 5 of the City [221] of Lovelock offered by plaintiff for identification, objected to by defendant, to be argued in the morning. Cora F. Darrah and James A. Meffley called and testified for plaintiff. Thereupon the case was continued until tomorrow morning at

ten o'clock, and the Court admonished the jury not to talk about the case among themselves nor to permit others to discuss it in their presence or hearing, etc.

Court adjourned until tomorrow morning at ten o'clock.

MINUTE ENTRY, JUNE 2, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—June 2, 1921—Trial
(Continued)**

The same counsel and the jury being present the trial of this case was resumed by counsel for the respective parties arguing plaintiff's motion for admittance in evidence of City Ordinance No. 5 of Lovelock, Nevada, and the defendant's objection thereto; upon completion of the arguments the Court ordered the said Ordinance admitted and marked Plff's. Ex. No. 4; W. R. McCullough was called and testified on behalf of plaintiff. Dr. William L. Kingsbury was also called and testified for plaintiff, and during his testimony negatives of X-ray photographs on the prints therefrom were introduced in evidence, these were photographs of the plaintiff's anatomy, J. B. Daniel; the negatives marked with odd numbers, the prints corresponding therewith marked with the following even

numbers, to wit: Plff's. Ex. No. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. Dr. Wm. F. Crawford called on behalf of the plaintiff and demonstrated his treatment of the plaintiff upon Mr. J. B. Daniel himself. J. B. Daniel recalled by plaintiff during which testimony the original complaint and the original answer thereto were offered in evidence, ordered admitted and marked Plff's. Ex. Nos. 21 and 22 respectively. Admitted under objection of defendant and subject to his exception. Plaintiff rests. Mr. Springmeyer moved the dismissal of the suit; argued by respective counsel; submitted and motion denied by the Court. The jury was again admonished by the Court as heretofore and [222] the case was continued until to-morrow morning at ten o'clock.

Court adjourned until to-morrow morning at ten o'clock.

MINUTE ENTRY, JUNE 3, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—June 3, 1921—Trial
(Continued).**

The same counsel and the jury being present the further trial of this cause was resumed by defendant calling W. R. McCullough, during which testimony checks signed by Ellizabeth A. Rodgers

were testified from, and ordered admitted and marked as follows, to wit: Check for \$3000.00 marked Deft's. Ex. No. "A"; check for \$122.52 marked Deft's. Ex. No. "B"; Check for \$10.24, marked Deft's. Ex. No. "C"; check for \$198.60 marked Deft's. Ex. No. "D"; check for \$338.45 marked Deft's. Ex. No. "E"; check for \$71.43 marked Deft's. Ex. No. "F"; check for \$27.25 marked Deft's. Ex. No. "G"; all dated July 28, 1919. Fred Davis was called by defendant, during which testimony defendant's map of Main Street, Lovelock, offered, ordered admitted and marked Deft's. Ex. No. "H". Mrs. Warren J. Flick and Mrs. C. F. Darrah were called and testified on behalf of defendant. The depositions of Hazel Zunini and double deposition of Mrs. Elizabeth A. Rodgers and her daughter, Millie L. Evans, the defendant herein, were opened and marked by the clerk at the request of Mr. Kearney, offered and read in evidence by him.. The jury was again admonished by the Court as heretofore, and the case was continued until to-morrow morning at 9 o'clock.

Court adjourned until to-morrow morning at 9 o'clock.

MINUTE ENTRY, JUNE 4, 1921.

No. 2270.

J. B. DANIEL

Plaintiff,

vs.

MILLIE L. EVANS.

Defendant.

**Minutes of Court—June 4, 1921—Trial (Continued)
and Verdict.**

The same counsel and the jury being present the further trial of this cause was resumed by the depositions introduced the day previous being read by Mr. Springmeyer. Dr. Donald Maclean was called [223] by defendant and testified from the X-ray plates in evidence herein. The deposition of Mrs. R. H. Beal was marked and opened by the clerk at the request of Mr. Springmeyer, who read same into the evidence. Defendant rests. Mrs. Ada Nixon was called by plaintiff in rebuttal. Case reopened by plaintiff and J. B. Daniel recalled. Both plaintiff and defendant rest. The case was then argued and submitted by respective counsel, and the jury, having been instructed by the Court, to which instructions defendant excepted, retired in charge of the Marshal to deliberate on the case, and at 7:35 o'clock P. M. returned into court with the following verdict, viz: "In the District Court of the United States for the District of Nevada. J. B. Daniel vs. Millie L. Evans. No. 2270. We, the jury in the above-en-

titled cause, find for the plaintiff in the sum of \$2,000.00. Dated this 4th day of June, 1921. Geo. A. Campbell, Foreman." And so they all say. Mr. Kearney asks, and it is granted, the benefit of an exception to the finding of the jury. Upon motion of Mr. Kearney and no objection on the part of the plaintiff, it is ordered that the defendant be, and she is hereby allowed a thirty day stay of execution in order to move for a new trial or take such other steps as she may be advised. Upon motion of Mr. Goodman, and upon consent of counsel, it is ordered that the plaintiff be, and he is hereby granted an additional fifteen days within which to file his cost bill.

Court adjourned until Monday morning at ten o'clock.

MINUTE ENTRY, JUNE 8, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—June 8, 1921—Motion Allowing
Defendant Until Latter Part of July to File
Papers on Appeal.**

Upon motion of Mr. W. M. Kearney, attorney for the defendant herein, it is ordered that upon filing of stipulation of counsel the defendant may have to and until the latter part of July within which to file his necessary papers on appeal. [224]

MINUTE ENTRY, JUNE 13, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—June 13, 1921—Order Allowing to and Including July 25, 1921, to File Papers on Appeal.

Upon stipulation of counsel it is ordered that the defendant herein, be, and she is hereby, allowed to and including July 25th, next, within which to prepare and file the necessary papers on an appeal of this case.

MINUTE ENTRY, JULY 22, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—July 22, 1921—Order Allowing to and Including August 25, 1921, to File Papers on Appeal.

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including August 25th, 1921, within which to prepare, serve and file her memorandum of errors and affidavits, etc., relied on on motion for new trial, her bill of

exceptions herein, her petition and specification of errors for allowance of writ of error herein, and to take such other, further or different steps as are necessary or advisable on a motion for new trial and on the perfection of a writ of error herein.

MINUTE ENTRY, AUGUST 24, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—August 24, 1921—Order Allowing Defendant Five Days After Court Rules on Defendant's Motion for New Trial Within Which to File Bill of Exceptions.

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including five days after the Court rules upon the defendant's motion for a new trial herein, within which to prepare, serve and file her bill of exceptions, her petition for allowance of a writ of error, and to take such other, further or different steps as are necessary or advisable on the perfection of a writ of error herein. [225]

MINUTE ENTRY, DECEMBER 3, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—December 3, 1921—Argument
on Motion for New Trial.**

This being the time heretofore fixed for hearing argument upon the motion for a new trial, Mr. Booth B. Goodman appeared for the plaintiff; Messrs. W. M. Kearney and George Springmeyer for the defendant. Upon the conclusion of the arguments by counsel for the respective parties the matter was ordered submitted and by the Court taken under advisement.

MINUTE ENTRY, DECEMBER 22, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—December 22, 1921—Order
Denying Motion for New Trial.**

Ordered that the motion for a new trial, heretofore argued and submitted in this case, be, and the same is hereby denied and the parties and each of them are given twenty days from and after this date to take such steps as they may be advised.

MINUTE ENTRY, JANUARY 24, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—January 24, 1922—Bill of Exceptions Presented and Testimony Therein Ordered Reduced.

This being the time set by defendant's notice for the presentation and allowance of her bill of exceptions, Messrs. Wm. M. Kearney and George Springmeyer appeared for the said bill; Mr. B. B. Goodman for the plaintiff. Mr. Kearney presented for approval and allowance his bill of exceptions which contained a full transcript of the testimony, stating that it had been impossible for him and his associates to reduce his testimony to narrative form owing to the large amount of court work they had been engaged in and he asked the [226] plaintiff to stipulate that the same is correct and should be approved. Plaintiff is willing to stipulate that the testimony and proceedings as set forth in the bill of exceptions, offered, is correct and that the bill of exceptions as here presented containing the reporter's transcript be allowed and sent up to the Court of Appeals. Plaintiff stated that he had no objections to offer to the bill of exceptions as offered or to the allowance of the same by the Court. The defendant asked the Court for an order allow-

ing her twenty days' additional time within which to reduce this testimony to narrative form. Upon this motion, IT IS ORDERED that defendant have to and until the 28th instant within which to reduce the testimony in the bill of exceptions; plaintiff to have to and including February 4th, thereafter within which to file his exceptions thereto; and the matter of the settlement and allowance of said bill of exception will be heard and determined February 7th, 1922, at ten o'clock A. M.

MINUTE ENTRY, FEBRUARY 7, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—February 7, 1922—Bill of Exceptions Presented and Ordered Amended.

This being the time heretofore appointed for representing for approval defendant's bill of exceptions, Mr. Booth B. Goodman appeared for and on behalf of the plaintiff; Mr. Wm. M. Kearney for the defendant. Mr. Kearney presented his bill of exceptions and also plaintiff's objections thereto, and after argument by counsel for the respective parties, it is ordered that the twelve requested instructions of the defendant be stricken from the bill of exceptions; that the depositions of Mrs. Elizabeth A. Rogers and Millie L. Evans be in-

serted in the bill following the testimony at page 159; objections numbered one and eight are disallowed; objections numbered two, three and four will be allowed when the last paragraph of the stipulation referred to in objection four is inserted as it is the stipulation; objections five, six and nine will be allowed when corrected [227] to conform to the official reporter's notes; and it is further ordered that the corrected bill of exceptions be presented to-morrow for approval.

MINUTE ENTRY, FEBRUARY 8, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—February 8, 1922—Order
Approving Bill of Exceptions.**

Counsel for both parties being present, IT IS ORDERED that the alterations to the bill of exceptions as ordered yesterday be made and the said bill of exceptions approved. It is further ordered that all further proceedings herein be stayed in this court pending the appeal to the United States Circuit Court of Appeals at San Francisco, and it is further ordered that citation issue herein returnable to the said United States Circuit Court of Appeals thirty days from the date hereof, and it is further ordered that defendant's writ of error be and the same is hereby approved and allowed.

MINUTE ENTRY, MARCH 9, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—March 9, 1922—Order Extending Time Thirty Days to File Record and Docket Cause.

Good cause appearing, IT IS ORDERED that the defendant be, and she is hereby, allowed thirty (30) days' additional time from the 10th day of March, 1922, within which to prepare and file record on appeal. [228]

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Certificate and Return to Interrogatories and Cross-Interrogatories.

TO ALL TO WHOM THESE PRESENTS
SHALL COME:

I, E. E. Ely, Notary Public residing and having office at Herington, Kansas, do hereby certify that

pursuant to the stipulation signed by solicitors for the above-named plaintiff and defendant, and dated the 9th day of March, 1921, Mrs. R. H. Beale, the witness named in said stipulation, appeared before me on the 31st day of May, 1921, when I took and completed her answers or depositions to the interrogatories and cross-interrogatories propounded by the said solicitors respectively in the above-named action, the said answers or deposition being hereunto annexed, and I further certify that previous to such answers or deposition being taken, duly administered to the said Mrs. R. H. Beale the following oath: "You do solemnly swear that the testimony you are about to give in the action entitled J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant, will be the truth, the whole truth and nothing but the truth, so help you God."

In testimony whereof, I said notary, have hereunto subscribed my name and affixed my official seal at Herington, Kansas, this 31st day of May, 1921.

[Seal]

E. E. ELY,
Notary Public.

Term expires June 23, 1923. [229]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation for Taking Deposition.

It is stipulated between the parties hereto that the deposition of Mrs. R. H. Beale, witness for the defendant, residing at 102 N. Eighth Street, Herington, Kansas, upon the interrogatories and cross-interrogatories hereto annexed may be taken by virtue of this stipulation (and without commission or other authority or power) by any Notary Public there residing, at such time as said Notary Public may fix; and the taking of said deposition may be adjourned from time to time to suit the convenience of said Notary Public and said witness, provided that nothing herein contained shall unreasonably delay the trial of this action.

The certificate and seal of said Notary Public shall be sufficient proof of his name and official character, without other or further authentication; all other formalities being hereby expressly waived.

Said deposition when taken shall be mailed by said Notary to the Clerk of the above-entitled Court at Carson City, Nevada, and may be read in evidence by either party, subject only to objection as

to the competency, materiality or relevancy of the testimony set forth therein.

Dated: March 9th, 1921.

W. M. KEARNEY and

CANTWELL & SPRINGMEYER,

Solicitors for Defendant.

ROBERT RICHARDS,

BOOTH B. GOODMAN,

Solicitors for Plaintiff. [230]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Interrogatories Propounded to Mrs. R. H. Beale,
for Defendant.**

Interrogatories to be propounded to Mrs. R. H. Beale, witness of the defendant in the above-entitled action, residing at 102 North Eighth Street, Herington, Kansas:

First Interrogatory.

State your name and residence.

Second Interrogatory.

Were you in Lovelock, Nevada, in the months of July and August, 1919, and if so, for what parts of such months, or of either of them.

Third Interrogatory.

Do you recall having visited a moving picture

performance in Lovelock, Nevada, on or about the 1st day of August, 1919, in company with a Mrs. Flick?

Fourth Interrogatory.

If you have answered the preceding interrogatory in the affirmative, state as nearly as you can the date and the time of the day when you so attended that performance?

Fifth Interrogatory.

State whether or not the plaintiff J. D. Daniel and his wife were present at that performance?

Sixth Interrogatory.

If you have answered that plaintiff and the wife of the plaintiff were present at that performance, state, if you know, where they sat with reference to the seats occupied by Mrs. Flick and yourself?

Seventh Interrogatory.

Was there any conversation between Mr. Daniel and yourself, held during that performance, relative to how he was feeling? [231]

Eighth Interrogatory.

If you have answered the preceding interrogatory in the affirmative, please state that conversation as fully as you can recall it?

Ninth Interrogatory.

At that time and place did Mr. Daniel express any intention of making any trip in the near future?

Tenth Interrogatory.

If you have answered the preceding interrogatory

in the affirmative, please state just what Mr. Daniel said with reference to such trip?

W. M. KEARNEY and
CANTWELL & SPRINGMEYER,
Solicitors for Deft.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Waiver of Right to Propound Cross-Interrogatories.

The *defendant* not desiring to propound cross-interrogatories to Mrs. R. H. Beale, hereby waives his right to include cross-interrogatories in the foregoing stipulation to take the deposition of said witness.

ROBT. RICHARDS and
BOOTH B. GOODMAN,
Solicitors for Plaintiff. [232]

Ans. to Interog. No. 1.

Mrs. R. H. Beale, 102 North 8th Street, Herington, Kan.

Ans. to Interog. No. 2.

Was in Lovelock about the 10th day of July, 1919 and was in Lovelock several times during the month of August, but cannot remember the dates.

Ans. to Interog. No. 3.

Yes

Ans. to Interog. No. 4

About 8 P. M. about August 1st, 1919.

Ans. to Interog. No. 5.

They were.

Ans. to Interog. No. 6

Mrs. Flick sat at my right, Mrs. Daniel to the right of Mrs. Flick and Mr. Daniel to the right of Mrs. Daniel.

Ans. to Interog. No. 7.

Yes

Ans. to Interog. No. 8.

I asked Mr. Daniel how he was feeling and he replied "fairly well" or words to that effect.

Ans. to Interog. No. 9.

Yes.

Ans. to Interog. No. 10.

Said he was leaving the next day on a motor trip to Tahoe.

In the District Court of the United States in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answers to Interrogatories by Mrs. R. H. Beale.

Answers to interrogatories propounded to Mrs.
R. H. Beale, witness for the defendant in the above-

entitled action, residing at 102 North Eighth Street, Herington, Kansas, taken by E. E. Ely, of Herington, Kansas, aforesaid, Notary Public:

The said Mrs. R. H. Beale being first duly sworn, on oath deposes and says:

In answer to the first interrogatory:

In answer to the second interrogatory: etc.

Mrs. R. H. BEALE.

Subscribed and sworn to before me this 31st day of May, 1921.

[Seal]

E. E. ELY,
Notary Public.

Term expires June 24, 1923.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation Covering Taking of Deposition. Filed this 4th day of June, 1921. E. O. Patterson, Clerk. Cantwell & Springmeyer, Reno, Nevada, and W. M. Kearney, Attorneys for Defendant. [233]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS.

Defendant.

Stipulation to Take Deposition De Bene Esse.

It is hereby stipulated by and between the parties hereto, that the deposition of Hazel Zunini, a witness for Defendant, may be taken before Horace A. Johnson, Notary Public of the State of California in and for the County of Alameda, at 2127 Center St., Berkeley, California, on Wednesday the 28th day of April, 1920, at 2 o'clock P. M., or on such other day and time as said matter may be postponed by said notary.

The said deposition shall be under oath of the witness administered by said Notary, upon oral question and answer propounded to the witness by counsel, the questions and answers taken down in writing, read and signed by the witness, sealed and signed by the Notary, and transmitted to the clerk of the above-entitled court, to be opened at the trial and read in evidence by the party on behalf of whom the deposition is taken or by either party.

Dated this 24 day of April, 1920.

BOOTH B. GOODMAN,
Counsel for Plaintiff,
W. M. KEARNEY and
JOHN E. BENNETT,
Counsel for Defendant.

Leave to take the foregoing deposition is hereby granted, and this shall serve as commission thereto.

Judge. [234]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Deposition of Hazel Zunini.

BE IT REMEMBERED, that pursuant to the stipulation hereunto annexed, and on the 28th day of April, 1920, at 2127 Center St., Berkeley, Alameda County, California, and at the hour of 2 o'clock P. M., before me Horace A. Johnson, a notary public in and for the said County of Alameda, State of California, personally appeared Hazel Zunini, a witness produced on behalf of the defendant in the above-entitled action, now pending in said court, who being first by me duly sworn was then and there examined and interrogated by John E. Bennett, Esq., of counsel for defendant, Booth B. Goodman, counsel for plaintiff being also present; the witness testified as follows:

(Question by Mr. BENNETT.)

Question: State your name, age and residence.

Answer: Hazel Zunini, 18 years, Lovelock, Nevada.

I am acquainted with him.

Question: Did you know him in July, 1919?

Answer: Just to speak to.

Question: During that month did you observe an accident to Mr. Daniels on the street in Lovelock?

Answer: Yes.

Question: Where were you when you saw that?

Answer: Right in front of the Mercantile Building.

Question: That is, were you standing on the sidewalk?

Answer: Yes.

Question: On what street was that?

Answer: It was Fourth Street at that time.

Question: How far was that from the post office?

Answer: It was right across the street, where I was standing.

Question: What did you see in connection with the accident? [235]

Answer: I saw Mr. Daniels going across the street. I saw a fellow in a Ford. He ran into Mr. Daniels; Mr. Daniels was knocked down.

Question: Where did Mr. Daniels cross the street, on what side of the street and in front of what place?

Answer: I don't remember whether he was coming from the post office or going to it.

Question: Where was he when you first saw him?

Answer: Well, about in the middle of the street.

Question: In which direction was the automobile going?

Answer: The street runs east and west, and the machine was going west.

Question: How does the railroad track run?

Answer: North and South.

Question: On which side of the railroad track is the postoffice?

Answer: West of the railroad track.

Question: Where was Mr. Daniels, with respect to compass point when you first saw him? Was he north of the machine or south of it?

Answer: I can't say that.

Question: Fix it in your mind now where he was when you saw him, was he in the street?

Answer: Yes.

Question: On which side of the machine was he?

Answer: What do you mean?

Question: What side of the street were you standing on?

Answer: On the south side.

Question: When you first saw Mr. Daniels was he on the side of the machine nearest you, or farthest from you?

Answer. Farthest from me.

Question: On which end of the machine was he, in front or behind it?

Answer: I don't know.

Question: Was he ahead of it or in the rear of it?

Answer: I don't know.

Question: What was he doing when you first saw him?

Answer: You mean Mr. Daniels?

Question: Yes.

Answer: It seems to me he was picking himself up. I can't remember [236] that very well.

Question: What do you mean by picking himself up?

Answer: He was trying to get up.

Question: Was he on the ground?

Answer: I suppose he was.

Question: Did you see him after he got on his feet, or did he get on his feet?

Answer: Yes.

Question: What did he do then?

Answer: He just walked over toward that side of the street, toward the post office.

Question: Did he go into the post office?

Answer: I don't know.

Question: Who was in the machine?

Answer: One man; I don't know who it was.

Question: Where was the machine when Mr. Daniels was picking himself up?

Answer: The machine was there too because right after he knocked Mr. Daniels down he stopped.

Question: Did the man get out of the machine or remain in it?

Answer: I didn't see him get out; I don't think he did.

Question: Was Mr. Daniels at the time he was picking himself up on the side of the machine nearest you or nearest the postoffice?

Answer: Nearest the postoffice.

Question: So the machine was between you and Mr. Daniels, from where you stood?

Answer: Yes.

Question: Were any other persons at the place

of the accident beside Mr. Daniels and the man in the machine at any time while you were looking?

Answer: Yes.

Question: Who did you see?

Answer: Mr. Wolf was one.

Question: Who is Mr. Wolf?

Answer: He is a constable. [237]

Question: Where was Mr. Wolf when you first saw him?

Answer: He was talking to the man in the machine.

Question: Where was Mr. Daniels at that time?

Answer: I don't remember.

Question: Had he gone into the postoffice then?

Answer: I don't know.

Question: What else did you see Mr. Wolf do besides talk to the man in the machine?

Answer: That's all. I don't know what he did afterwards.

Question: Did you see anyone else there besides Mr. Daniels, the man in the machine and Mr. Wolf?

Answer: I don't know whether there was anybody there or not.

Question: Whereabouts was the machine with reference to the middle of the street at the time you first saw Mr. Daniels. Was it in the center of the street or to one side?

Answer: I don't remember just where it was.

Question: Was it closest to the curb on your side, or closest to the curb on the opposite side?

Answer: I don't know.

Question: How far from the postoffice was it?

Answer: I don't know.

Question: What became of the machine after Mr. Daniels got up?

Answer: I don't know whether it stayed there or whether it went away.

Question: Did you see Mr. Daniels after the accident?

Answer: Not after I saw him walk towards the postoffice.

Question: Have you talked with him since at any time until today?

Answer: No.

Question: Do you know Mr. Goodman, his counsel?

Answer: Yes, I know him. I have not talked with him about the matter.

Question: Do you know Mrs. Davis in Lovelock?

Answer: I don't remember her at all.

Question: Were you employed in Lovelock at the time in any occupation?

Answer: Yes. [238]

Question: Who were you with?

Answer: With Roberts, Affleck and Deady.

Question: What did they do?

Answer: Lawyers.

Question: Where were their offices?

Answer: In the Mercantile Building.

Question: On what floor?

Answer: Second floor.

Question: Were you looking from those offices at the accident?

Answer: No, I was downstairs, on the sidewalk.

Cross-examination by Mr. GOODMAN.

Q. From the office where you worked you could not see the postoffice at all? A. No.

Q. Isn't (it) a fact that all of the things which you saw happened very quickly? A. Yes.

Q. Can you say whether or not there was many automobiles on the street at the time of the accident? A. I can't remember.

Q. You didn't observe? A. No.

Q. Do you know at what point Mr. Daniels left the sidewalk to cross the street? A. No.

Q. Did you notice where the car started from?

A. I don't know where it started from but I know it was coming west.

Q. What attracted your attention to the car?

A. Well, I don't know. I know it was going west.

Q. Wasn't it the noise of the car that attracted your attention? A. I don't know.

Q. It was a Ford car? A. Yes.

Q. And it was going pretty fast, wasn't it?

A. Well, I can't say. I don't know how fast it was going.

Q. It was not going slowly, was it?

A. I can't remember.

Q. What was Mr. Wolf saying to the man in the machine? A. I don't know.

Q. Have you ever discussed this matter with Mr.

Daniels, myself, or any person representing Mr. Daniels? A. No.

Q. Have you any interest in the outcome of the action? A. No. [239]

(Question by Notary:)

Q. Do you know anything about this matter of interest or benefit to either side, or do you want to say anything farther in the matter? A. No.

HAZEL ZUNINI.

State of California,
County of Alameda,—ss.

I, Horace A. Johnson, a Notary Public in and for said county, do hereby certify that the witness in the foregoing deposition, named Hazel Zunini, was by me duly sworn; that said deposition was then taken at the time and place mentioned in the annexed order, to wit, at my office in the county of Alameda, State of California, and on the 28th day of April, 1920, between the hours of two P. M. and four P. M., of that day; that said deposition was reduced to writing by John E. Bennett, and when completed was carefully read to said witness, and was by her subscribed in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the county of Alameda, this 28th day of April, 1920.

HORACE A. JOHNSON,
Notary Public.

[Endorsed]: No. 2270. U. S. Dist. Court of Nevada. J. B. Daniel vs. Millie L. Evans. Deposi-

tion of Hazel Zunini. Opened and published June 3, 1921, at request of W. M. Kearney. Filed June 3, 1921. E. O. Patterson, Clerk. [240]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE. L. EVANS,

Defendant.

**Stipulation to Take Deposition De Bene Esse of
W. F. Crawford.**

IT IS HEREBY STIPULATED by and between the above-named parties, through their respective counsel, that the deposition of W. F. Crawford, a witness for plaintiff, may be taken before Robert Wallace, Jr., Notary Public, at the office of said Robert Wallace, Jr., in the town of Brentwood, State of California, on the 29th day of April, 1920, at Two o'clock P. M., or on such other day and time as the matter may be adjourned or postponed by said Notary Public.

The deposition shall be under oath of the witness administered by the Notary, upon oral question and answer propounded to the witness by counsel, the questions and answers taken down in writing, read and signed by the witness, sealed and signed by the Notary, and transmitted to the Clerk

of the above-entitled Court, to be opened at the trial and read in evidence by the party on behalf of whom the deposition is taken or by either party.

Dated this 24th day of April, 1920.

BOOTH B. GOODMAN,
Counsel for Plaintiff.
W. M. KEARNEY and
JOHN E BENNETT,
Counsel for Defendant.

Leave to take the foregoing deposition is hereby granted, and shall serve as commission thereto.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation to Take Deposition *De Bene Esse*. Filed April 28th, 1920. T. J. Edwards, Clerk. Booth B. Goodman, Attorney and Counsellor, Lovelock, Nevada. [241]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Stipulation to Take Deposition De Bene Esse of
Hazel Zunin.**

IT IS HEREBY STIPULATED by and between the parties hereto, that the deposition of Hazel Zunini, a witness for defendant, may be taken before H. A. Johnson, Notary Public of the State of California, in and for the County of Alameda, at 2127 Center St., Berkeley, California, on Wednesday, the 28th day of April, 1920, at 2 o'clock P. M., or on such other day and time as said matter may be postponed by said Notary.

The said deposition shall be under oath of the witness administered by said Notary, upon oral question and answer propounded to the witness by counsel, the questions and answers taken down in writing, read and signed by the witness, sealed and signed by the Notary, and transmitted to the Clerk of the above-entitled Court, to be opened at the trial and read in evidence by the party on behalf of whom the deposition is taken or by either party.

Dated this 24 day of April, 1920.

BOOTH B. GOODMAN,
Counsel for Plaintiff,
W. M. KEARNEY and
JOHN E. BENNETT,
Counsel for Defendant.

Leave to take the foregoing deposition is hereby granted, and this shall serve as commission thereto.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation to Take Deposition *De Bene Esse* of Hazel Zunini. Filed May 1st, 1920. T. J. Edwards, Clerk. W. M. Kearney and John E. Bennett, 248 Russ Bldg., San Francisco, Calif. Attorneys for Defendant. [242]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the writ of error heretofore allowed by said court, and include in the said transcript the following papers, proceedings and orders on file, to wit:

1. Petition for writ of error filed January 24, 1922.
2. Assignment of error filed with writ of error January 24, 1922.

3. Order allowing writ of error dated February 8, 1922.

4. Bill of exceptions filed January 28, 1922.

5. Citation on writ of error filed February 8, 1922.

6. Bond on writ of error.

7. All minutes of the court and orders made in the cause.

8. Writ of error.

9. Affidavit of service of copies of writ of error.

10. All stipulations on file in the cause.

11. Depositions of Mrs. R. H. Beale and of Hazel Zunini.

12. All exhibits admitted in the case.

13. Certification of court to defendant's exceptions taken to the order of court striking from the proposed bill of exceptions defendant's instructions. [243]

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: February 10th, 1922.

W. M. KEARNEY and

CANTWELL & SPRINGMEYER,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Praecipe for Transcript of Record. Filed Feb. 13th, 1922. E. O. Patterson, Clerk. W. M. Kearney, Reno, Nevada, One of the Attorneys for Defendant. [244]

In the District Court of the United States for the
District of Nevada.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Order Enlarging Time Thirty Days to File Record
and Docket Cause.**

Good cause appearing, it is ordered that the defendant be, and she is hereby, allowed thirty (30) days' additional time from the 10th day of March, 1922, within which to prepare and file record on appeal.

Done in open Court this 9th day of March, 1922.

E. S. FARRINGTON,

Judge.

[Endorsed]: No. 2270. U. S. District Court,
District of Nevada. J. B. Daniel vs. Millie L.
Evans. Order Extending Time. Filed this 9th day
of March, 1922. E. O. Patterson, Clerk. By O.
E. Benham, Deputy. [245]

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the Records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of J. B. Daniel, Plaintiff, vs. Millie L. Evans, also known as Millie R. Evans, and Malvina Evans, Defendant, said case being No. 2270 on the docket **of said court.**

I further certify that the attached transcript, consisting of 247 typewritten pages numbered from 1 to 247 inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the Defendant's Exhibits Nos. "A," "B," "C," "D," "E," F, G, and H (all in one envelope and marked accordingly) and Plaintiff's Exhibits Nos. 1 to 20 inclusive, all of

which accompany this transcript, to be the original exhibits filed in the above-entitled case, and that Plaintiff's Exhibits Nos. 21 and 22 (Original Complaint and Original Answer) are on file in this office but are represented by true copies and made a part of this transcript.

I further certify that the cost for preparing and certifying to said record, amounting to \$121.80, has been paid to me by W. M. Kearney, Attorney for the plaintiff in error in the above-entitled cause.
[246]

And I further certify that the original writ of error, and the original citation, issued in this cause are hereto attached.

Witness my hand and the seal of said United States District Court this 30th day of March, 1922.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.
[247]

C

[Endorsed]: No. 3855. United States Circuit Court of Appeals for the Ninth Circuit. Millie L. Evans, now Millie L. Jones, Plaintiff in Error, vs. J. B. Daniel, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed April 1, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States to the Honorable
E. S. FARRINGTON, Judge of the District
Court of the United States, for the District of
Nevada, GREETING:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which
is in the said District Court before you, between
J. D. Daniel, plaintiff, and defendant in error, and
Millie L. Evans (now Millie L. Jones), defendant,
plaintiff in error, a manifest error hath happened
to the great damage of said Millie L. Evans, plain-
tiff in error, as by said proceeding appears, and
we being willing that error, if any hath been, should
be duly corrected, and full and speedy justice done
to the parties aforesaid in this behalf, do command
you, if judgment therein be given, that then, under
your seal, distinctly and openly, you send the rec-
ord and proceedings, with all things concerning the
same, to the United States Circuit Court of Ap-
peals for the Ninth Circuit, together with this writ,
so that you have the same at the City and

County of San Francisco, in the State of California, on the 10th day of March, A. D. 1922, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, that said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable E. S. FARRINGTON, United States District Judge for the District of Nevada, the 10th day of February, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

E. O. PATTERSON,

Clerk of the United States District Court for the District of Nevada.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Writ of Error. Filed Feb. 10th, 1922. E. O. Patterson, Clerk.

No. 3855. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 1, 1922. F. D. Monckton, Clerk.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Citation on Writ of Error (Original).

To J. B. Daniel, the Plaintiff and Defendant in
Error in the Above-entitled Action, GREET-
ING:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be
holden at the city of San Francisco, in said circuit,
within 30 days from date, pursuant to a writ of
error filed in the clerk' office of the district court
of the United States for the district of Nevada,
wherein Millie L. Evans (now Millie L. Jones) is
plaintiff in error, and you are defendant in error,
to show cause, if any there be, why the judgment
rendered against the said plaintiff in error, as in
the said writ of error mentioned, should not be
corrected, and why speedy justice should not be done
to the parties in the behalf.

WITNESS the Honorable E. S. FARRINGTON,
District Judge of the United States, at Carson
City, Nevada, within said circuit this 8th day of
February, 1922.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Citation on Writ of Error. Filed Feb. 8, 1922. E. O. Patterson, Clerk.

Service accepted Feb. 8th, 1922.

BOOTH B. GOODMAN,
Attorney for Plaintiff.

No. 3855. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 1, 1922. F. D. Monckton, Clerk.

